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In the Supreme Court of the United States

FEDERAL ELECTION COMMISSION, PETITIONER

v.

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether a political party has a First Amendment right to make unlimited campaign expenditures in coordination with the party's congressional candidates, notwithstanding the limits on such coordinated expenditures imposed by the Federal Election Campaign Act of 1971, 2 U.S.C. 431 *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-53a) is reported at 213 F.3d 1221. The opinion of the district court (Pet. App. 54a-91a) is reported at 41 F. Supp. 2d 1197. An earlier opinion of this Court in this case (Pet. App. 92a-142a) is reported at 518 U.S. 604. An earlier opinion of the court of appeals (Pet. App. 143a-162a) is reported at 59 F.3d 1015. An earlier opinion of the district court (Pet. App. 163a-180a) is reported at 839 F. Supp. 1448.

JURISDICTION

The judgment of the court of appeals was entered on May 5, 2000. The petition for a writ of certiorari was filed on August 3, 2000, and was granted on October 10, 2000. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. Section 441a(d) of Title 2, United States Code, provides in pertinent part:

> (d) Expenditures by national committee, State committee, or subordinate committee of State committee in connection with general election campaign of candidates for Federal office
>
> (1) Notwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions, the national committee of a political party and a State committee of a political party, including any subordinate committee of a State committee, may make expenditures in connection with the general election campaign of candidates for Federal office, subject to the limitations contained in paragraphs (2) and (3) of this subsection.
>
> * * * * *
>
> (3) The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party which exceeds—

> (A) in the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of—
>
> (i) 2 cents multiplied by the voting age population of the State (as certified under subsection (e) of this section); or
>
> (ii) $20,000; and
>
> (B) in the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner in any other State, $10,000.

STATEMENT

1. This case involves the application of the Federal Election Campaign Act of 1971 (FECA or Act), 2 U.S.C. 431 *et seq.*, to the campaign spending of political parties. The Act imposes limits on contributions to candidates for federal office. Individuals may contribute no more than $1000 to any federal candidate, and multicandidate political committees[1] no more than $5000, with respect to any election. 2 U.S.C. 441a(a)(1)(A) and (2)(A).

Since its decision in *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), this Court has recognized a "fundamental constitutional difference between money spent to advertise one's views independently of the candidate's campaign and money contributed to the candidate to be spent on his

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[1] A multicandidate political committee is "a political committee which has been registered under [2 U.S.C. 433] for a period of not less than 6 months, which has received contributions from more than 50 persons, and, except for any State political party organization, has made contributions to 5 or more candidates for Federal office." 2 U.S.C. 441a(a)(4); see 11 C.F.R. 100.5(e)(3).

campaign." *FEC* v. *National Conservative PAC (NCPAC)*, 470 U.S. 480, 497 (1985); see also *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 259-260 (1986) ("We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending."); *Nixon* v. *Shrink Mo. Gov't PAC*, 120 S. Ct. 897, 903-904 (2000). In *Buckley*, the Court upheld the FECA's limitations on contributions, finding that they serve a compelling government interest in "the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office." 424 U.S. at 25; see *id.* at 23-38. The Court struck down the Act's restrictions on independent expenditures, however, reasoning that "[t]he absence of prearrangement and coordination of an [independent] expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Id.* at 47; see *id.* at 39-59.

The instant case involves a category of payments commonly known as "coordinated expenditures," see *Buckley*, 424 U.S. at 46, which involve direct interaction with the candidate (or his agents) but do not involve a transfer of funds to the candidate himself. The FECA defines "expenditure" to include "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. 431(9)(A)(i). The Act provides that "expenditures made by any person in cooperation, consultation, or concert, with" a candidate or her agents "shall be considered to be a contribution to such candidate." 2 U.S.C.

441a(a)(7)(B)(i).[2] See *Buckley*, 424 U.S. at 46 ("expenditures controlled by or coordinated with the candidate and his campaign * * * are treated as contributions rather than expenditures under the Act"); *NCPAC*, 470 U.S. at 492 (coordinated expenditures "are considered 'contributions' under the FECA").

The FECA authorizes the national and state committees of a "political party" to make coordinated expenditures on behalf of their federal candidates well in excess of the contribution limits that apply to other entities. 2 U.S.C. 441a(d)(1); see H.R. Conf. Rep. No. 1057, 94th Cong., 2d Sess. 59 (1976) ("but for [Section 441a(d)], these expenditures would be covered by the contribution limitations stated in [Section 441a(a)(1) and (2)]"). The term "political party" is defined to mean "an association, committee, or organization which nominates a candidate for election to any Federal office whose name appears on the election ballot as the candidate of such association, committee, or organization." 2 U.S.C. 431(16). In elections for the United States Senate, Section 441a(d) initially authorized each national or state party committee to expend the greater of $20,000 or two cents multiplied by the voting age population of the State in which the election is held. 2 U.S.C. 441a(d)(3)(A).[3]

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[2] "[I]ndependent expenditure[s]," by contrast, are defined as "expenditure[s] by a person expressly advocating the election or defeat of a clearly identified candidate which [are] made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which [are] not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate." 2 U.S.C. 431(17).

[3] As construed by the Federal Election Commission, Section 441a(d) permits a state party committee to make coordinated expenditures up to the limits set out in Section 441a(d)(2) and (3) in addition to the $5000 that can be contributed directly to the candidate. See 11 C.F.R. 110.7(b)(3); FEC Advisory Op. 1985-14, 2 Fed. Election Camp. Fin. Guide (CCH)

That limit is periodically adjusted for inflation. 2 U.S.C. 441a(c). By 1996, the coordinated party expenditure limit for the Senate election in Colorado had increased to approximately $171,000. C.A. App. 332. If a state party committee chooses not to make the coordinated expenditures that Section 441a(d) permits, it may assign its right to do so to a designated agent, such as a national committee of the party. See *FEC* v. *Democratic Senatorial Campaign Comm.* (*DSCC*), 454 U.S. 27, 31-43 (1981).

2. The instant case arises out of an enforcement action filed by petitioner Federal Election Commission (FEC or Commission) against respondent Colorado Republican Federal Campaign Committee.[4] The gravamen of the enforcement action was that respondent's payment for an advertisement attacking the voting record of Tim Wirth—at that time a candidate for the Democratic nomination for United States Senator—was an "expenditure" within the meaning of the FECA. Pet. App. 144a-145a, 164a-166a. Under the FEC's interpretation of the statute, that expenditure was conclusively presumed to be coordinated with the Republican Party's candidate for the Senate, on the theory that political party committees were deemed to be "incapable of making

¶ 5819, at 11,186 n.5 (May 30, 1985). Thus, if a party committee's coordinated expenditures exceeded the limits established by Section 441a(d)(2) and (3), the excess expenditure could be treated, up to the amount of $5000, as an in-kind contribution falling within the limitations of 2 U.S.C. 441a(a)(2).

[4] The Commission is an independent agency charged with the administration, interpretation, and civil enforcement of the FECA. See 2 U.S.C. 437c(b)(1), 437d(a) and (e), 437f, 437g. Congress has authorized the FEC to "formulate policy" under the Act, 2 U.S.C. 437c(b)(1); to institute investigations of possible violations of the Act, 2 U.S.C. 437g(a)(1) and (2); to initiate civil actions in the United States district courts to obtain judicial enforcement of the Act, 2 U.S.C. 437d(a)(6); and to initiate actions in the federal courts to determine the constitutionality of any provision of the Act, 2 U.S.C. 437h.

'independent' expenditures in connection with the campaigns of their party's candidates." *DSCC*, 454 U.S. at 28-29 n.1; see Pet. App. 105a-106a. Because respondent had previously assigned its entire Section 441a(d) coordinated expenditure authority to the National Republican Senatorial Committee, the FEC found probable cause to believe that respondent had violated the FECA limits on coordinated expenditures. *Id.* at 147a-148a.

Respondent contested the enforcement action. It also asserted a counterclaim, arguing that Section 441a(d)(3) is facially violative of the First Amendment. The district court dismissed the enforcement action, holding that the payment at issue was not subject to the FECA limits because it was not made "in connection with" any federal election. See Pet. App. 166a, 171a-180a. The court declined to address respondent's First Amendment challenge. *Id.* at 166a, 180a. The court of appeals reversed, holding that the payment was subject to (and violative of) the FECA cap on party coordinated expenditures, and that the cap was constitutional. *Id.* at 143a-144a, 149a-162a.

3. This Court reversed, sustaining respondent's challenge to the FEC's enforcement action while declining to adjudicate respondent's counterclaim. Pet. App. 92a-142a (518 U.S. 604) (*Colorado I*).

a. Three Justices concluded that the payment in question was properly regarded as an "independent" rather than a "coordinated" expenditure because the Chairman of the Colorado Republican Party had approved the advertisement and had consulted only with party officials. See Pet. App. 98a-100a (518 U.S. at 613-614) (Breyer, J., joined by O'Connor and Souter, JJ.). The plurality noted that under *Buckley*, restrictions on independent campaign expenditures are presumptively violative of the First Amendment. *Id.* at 100a-101a. The plurality found no justification for subjecting political parties to restrictions on independent spending that

could not constitutionally be imposed upon other entities. *Id.* at 101a-105a. The plurality rejected the government's contention that expenditures made by a political party in support of its candidates can be conclusively presumed to be coordinated. *Id.* at 105a-110a.

The plurality declined to consider the argument, raised in respondent's counterclaim, that the FECA limits on political party expenditures are unconstitutional even as applied to expenditures that are in fact coordinated with the candidate. See Pet. App. 110a-114a. The plurality explained that neither the parties' briefs nor the opinions of the lower courts had focused on that question. *Id.* at 111a. It also observed that because many party coordinated expenditures are "virtually indistinguishable from simple contributions (compare, for example, a donation of money with direct payment of a candidate's media bills)," *ibid.*, "a holding on in-fact coordinated party expenditures necessarily implicates a broader range of issues than may first appear, including the constitutionality of party contribution limits," *id.* at 112a. In the plurality's view, the difficulty of the constitutional question, and the parties' failure to focus on it, "provide[d] a reason for this Court to defer consideration of the broader issues until the lower courts have reconsidered the question." *Id.* at 113a.

b. Four Justices would have struck down the FECA limits on party expenditures even as applied to expenditures that are in fact coordinated with the candidate. See Pet. App. 114a-119a (518 U.S. at 626-631) (Kennedy, J., joined by Rehnquist, C.J., and Scalia, J., concurring in the judgment and dissenting in part); Pet. App. 119a-140a (518 U.S. at 631-648) (Thomas, J., joined in part by Rehnquist, C.J., and Scalia, J., concurring in the judgment and dissenting in part). Two Justices would have upheld the Commission's enforcement action. Pet. App. 140a-142a (518 U.S. at 648-650) (Stevens, J., joined by Ginsburg, J., dissenting).[5]

4. The case was remanded to the district court for further consideration of respondent's counterclaim. That counterclaim asserted that "the First Amendment forbids the government to limit [respondent's] coordinated expenditures. The FEC's attempts and intent to impose or enforce any limit on such coordinated expenditures are unconstitutional, unlawful, and void." J.A. 23. The district court granted respondent's motion for summary judgment and declared the FECA limits on party expenditures unconstitutional. Pet. App. 54a-91a.

a. The district court held that respondent had standing to challenge the FECA limits on party coordinated expenditures, see Pet. App. 69a-72a, and that respondent's claims were ripe for judicial review, see *id.* at 72a-74a. The court also held that Section 441a(d)'s application to coordinated expenditures was severable from its application (previously invalidated by this Court in *Colorado I*) to independent expenditures. See *id.* at 74a-76a. The district court explained that the "FECA contains a strong severability provision," *id.* at 74a (citing 2 U.S.C. 454), and it found "no evidence that Congress would have rejected [Section 441a(d)] as it applies to coordinated expenditures in the absence of a limit on independent expenditures," *id.* at 75a.

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[5] After this Court's decision in *Colorado I*, the Commission initiated a rulemaking and sought public comments to consider, *inter alia*, possible criteria for determining when spending by parties is coordinated. See Independent Expenditures and Party Committee Expenditure Limitations, 62 Fed. Reg. 24,367 (1997) (proposing revisions to 11 C.F.R. Pts. 100, 104, 109, 110). Although that part of the rulemaking had been held in abeyance pending ongoing litigation, the Commission solicited further public comments in December 1999. 64 Fed. Reg. 68,951-68,952, 68,955-68,956. The FEC has not yet proposed a final rule on that subject.

b. On the merits, the district court stated that "[t]he only permissible purpose for limitations on campaign expenditures is to prevent corruption or the appearance thereof." Pet. App. 79a. The court concluded that the FEC had failed to demonstrate a sufficient danger of actual or perceived corruption to justify the statutory limits on party coordinated expenditures. The court explained:

> [A] political party functions to promote political ideas and policy objectives over time and through elected officials. Given the purpose of political parties in our electoral system, a political party's decision to support a candidate who adheres to the [party's] beliefs is not corruption. Conversely, a party's refusal to provide a candidate with electoral funds because the candidate's views are at odds with party positions is not an attempt to exert improper influence. A candidate who does not wish to toe the party line is not excluded from participation in the political process or even in the party process. The FEC offers factual allegations which suggest that one party or the other withheld, or attempted to withhold, campaign funds from a candidate who expressed viewpoints or campaign tactics contrary to those thought preferable by the party. The court regards those as instances of the party and the candidate exercising their First Amendment rights. A party that refuses to fund a candidate who engages in what the party deems as undesirable campaign tactics is not reflecting corruption or the appearance of corruption.

Id. at 87a-88a (citation omitted). The district court entered a declaratory judgment "that the Party Expenditure Provision, 2 U.S.C.A. § 441a(d) (West 1997), is unconstitutional and cannot be enforced against [respondent]." *Id.* at 91a.

5. The court of appeals affirmed. Pet. App. 1a-53a.

a. The court of appeals acknowledged that "corruption or the appearance thereof are constitutionally sufficient justifications" for limits on coordinated campaign spending. Pet. App. 12a-13a. The court stated, however, that to establish the validity of Section 441a(d), "the FEC in this case must show that political parties through their spending authority corrupt or appear to corrupt the electoral process." *Id.* at 13a. The court expressed the view that

> [t]he opportunity for corruption or its appearance is greatest when the political spending is motivated by economic gain. * * * [P]olitical parties are diverse entities, one step removed from the candidate, and they exist for noneconomic reasons. Much like an advocacy group, a party functions "to disseminate political ideas, not to amass capital. The resources it has available are not a function of its success in the economic marketplace, but its popularity in the political marketplace."

Ibid. (quoting *Massachusetts Citizens for Life*, 479 U.S. at 259). The court of appeals also stated that "[f]rom the birth of this republic into the 21st century, political parties have provided the principal forum for political speech and the principal means of political association." *Id.* at 13a.

The court of appeals held that the Commission had failed to establish a constitutionally sufficient justification for Section 441a(d)'s restrictions on coordinated party spending in federal campaigns. The court stated that "the premise of [the FEC's] theory, namely that political parties can corrupt the electoral system by influencing their candidates' positions, gravely misunderstands the role of political parties in our democracy." Pet. App. 20a. It explained that

> [p]olitical parties today represent a broad-based coalition of interests, and there is nothing pernicious about this coalition shaping the views of its candidates. Parties are simply too large and too diverse to be corrupted by any

one faction. Evidence in the record demonstrates that the parties' hard money comes from individual donors who give, on average, less than $40 * * *.

Even if, as the FEC contends, party leaders subvert the greater will of the rank-and-file membership, we trust the members to replace their leaders. It is true that political parties have been involved in wrongdoing, dating back to the Tammany Hall machine. However, the electoral and litigation processes have always managed to right these wrongs. Given the importance of political parties to the survival of this democracy, we reject the notion that a party's influence over the positions of its candidates constitutes a subversion of the political process.

Id. at 21a-22a (internal quotation marks omitted).

The court of appeals also rejected the FEC's contention that the limits on party coordinated expenditures are a permissible means of preventing circumvention of other FECA contribution limits. The court stated that "[v]igilant enforcement of [2 U.S.C.] § 441a(a)(8)," which provides that contributions earmarked for a candidate shall be treated as contributions to the candidate himself, "is a more appropriate and direct means to safeguard the integrity of the individual contribution limits." Pet. App. 23a. The court of appeals concluded that the challenged FECA provision "constitutes a significant interference with the First Amendment rights of political parties," *id.* at 24a (internal quotation marks omitted), and that "[t]he FEC has not demonstrated * * * that coordinated spending by political parties corrupts, or creates the appearance of corrupting, the electoral process," *id.* at 25a.

b. Chief Judge Seymour dissented. Pet. App. 26a-53a. She stated that the panel majority had "create[d] a special category for political parties based on its view of their place

in American politics, a view at odds with history and with legislation drafted by politicians." *Id.* at 26a. She also expressed the view that the panel majority had "require[d] an improperly demanding level of proof from the FEC to support a contribution limit the Supreme Court has told us is presumably justified." *Id.* at 37a.

Chief Judge Seymour explained that Section 441a(d) reflected Congress's effort to balance competing interests by "permitting [parties] to make coordinated expenditures on behalf of their federal candidates far in excess of the limits imposed on others," Pet. App. 38a, without leaving party expenditures wholly unconstrained. See *id.* at 38a-39a. She found "no support in the Constitution, [the FECA], or Supreme Court authority for the majority's notion that political parties are entitled to favored treatment when assessing a contribution limit that impacts their associational rights." *Id.* at 40a. She also observed that "[t]he FEC's position voices long-standing Congressional concerns that have animated the history of efforts to reform federal election financing, many of which were addressed to the evils arising from large contributions to political parties that put the parties in political debt to the donors, debts which were often paid by the parties' candidates." *Id.* at 44a. Chief Judge Seymour concluded that "*[a]s a matter of common sense, it is difficult to credit the bald assertion that politicians do not understand the role political parties play in American politics.* Moreover, the majority is not at liberty to substitute its judgment for that of Congress on how best to balance the need to promote the role of political parties and to combat its potential for corruption." *Id.* at 50a (footnote omitted).

SUMMARY OF ARGUMENT

I. In *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), this Court upheld the FECA's limits on contributions to

candidates for federal office. Under the Act, a coordinated expenditure made in support of a federal candidate is treated as a contribution. In enacting 2 U.S.C. 441a(d), Congress sought to facilitate the parties' performance of their distinctive functions by authorizing party committees to make coordinated expenditures that would otherwise exceed the Act's limitations on contributions to candidates. Respondent's facial challenge to the Act's limitations on party coordinated expenditures can succeed only if those limitations are unconstitutional even as applied to coordinated expenditures that are the functional and constitutional equivalent of direct contributions to federal candidates. Because this Court has previously sustained the FECA's contribution limits against First Amendment challenge, and because the Act allows political parties to make much larger coordinated expenditures than other political committees, the FECA limits on party spending are presumptively constitutional.

II. Large coordinated expenditures by political party committees pose essentially the same risks of corruption as similar expenditures by other entities. Congress could reasonably conclude that large party-coordinated expenditures, like large campaign contributions generally, may be used to exert influence over legislators' behavior while in office. A candidate assisted by party-coordinated expenditures may, once elected or re-elected, be induced to take actions favorable to the individuals or political action committees who have contributed funds to the party, thereby in effect using the party as a conduit to evade the FECA limits on contributions to candidates. Alternatively, the candidate may be induced to favor the private interests or policy preferences of the party leaders who control the coordinated expenditures.

Even when individual party leaders conscientiously seek to use the influence generated by large coordinated expenditures not to advance their own interests or those of individual contributors, but to further the interests of the membership as a whole, Congress may legitimately choose to limit the extent to which large infusions of money may be used to achieve the party's objectives. Congress has reasonably concluded that the undue influence of large campaign contributions upon public policy is inherently subversive of democratic governance, regardless of the donor's motives. That judgment underlies the FECA contribution limits generally (whose application has never depended upon the motivation of the donor), and it is no less applicable to political parties.

III. Political parties have no favored constitutional status that would entitle them to an exemption from the spending limitations that apply to other potential donors. The Framers distrusted political parties and sought to devise governmental structures that would curtail their influence. Although the right to form and operate a political party is one aspect of the freedom of speech and association protected by the First Amendment, the Framers did not intend to create *special* privileges or incentives for partisan activity. The drafting and ratification history of the Constitution therefore provides no support for respondent's contention that the First Amendment entitles political parties to an exemption from the coordinated spending limits that apply to other voluntary associations.

Under the FECA, the distinguishing feature of a political party (as opposed to other organizations that endorse candidates for federal office and spend money in their support) is that the candidate is officially identified, on the ballot, as the party's nominee. Such official recognition on the ballot cannot plausibly be thought to expand the party's First Amendment rights by eliminating Congress's authority to impose coordinated spending limits that are validly applied to non-party political committees. To the contrary, when a political party assumes an official role in the State's electoral

machinery, it is typically subject to *greater* constraints than a political organization acting in a purely private capacity.

In enacting Section 441a(d), Congress sought to balance competing objectives by permitting parties to play an important role in federal campaigns without leaving party spending wholly unconstrained. That legislative judgment is entitled to substantial deference, particularly in light of Congress's intimate familiarity with the workings of our political system. Respondent's First Amendment claim would inappropriately restrict the authority of the federal and state governments to define and limit the role of the parties vis-à-vis other participants in ongoing public policy debates.

ARGUMENT

I. BECAUSE THIS COURT HAS PREVIOUSLY SUSTAINED THE FECA'S CONTRIBUTION LIMITS AGAINST FIRST AMENDMENT CHALLENGE, AND BECAUSE THE ACT ALLOWS POLITICAL PARTIES TO MAKE MUCH LARGER COORDINATED EXPENDITURES THAN OTHER POLITICAL COMMITTEES, THE FECA LIMITS ON PARTY SPENDING ARE PRESUMPTIVELY CONSTITUTIONAL

A. This Court Has Repeatedly Recognized The Authority Of Congress And The State Legislatures To Limit Monetary Contributions To Candidates For Public Office, Including Expenditures Made In Coordination With The Candidate

In *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), this Court sustained Congress's determination that bribery and public disclosure laws were not a sufficient response to the threat of electoral corruption, and "that contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions." *Id.* at 28; see also *id.* at 30 ("Congress was justified in concluding that the

interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated."). The Court in *Buckley* upheld both the $1000 limit on individual contributions imposed by the FECA and the Act's $5000 limit on contributions by a political committee to a single candidate. *Id.* at 58. The Court has since repeatedly referred, with evident approval, to the *Buckley* Court's holding that reasonable contribution limits are a constitutionally permissible means of preventing actual or apparent electoral corruption. See *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 259-260 (1986); *FEC* v. *National Right to Work Comm.*, 459 U.S. 197, 208 (1982); *California Med. Ass'n* v. *FEC*, 453 U.S. 182, 196-197 & n.16 (1981) (plurality opinion). Most recently, the Court in *Nixon* v. *Shrink Missouri Government PAC*, 120 S. Ct. 897 (2000), relied on *Buckley* in upholding Missouri's $1000 limit (adjusted for inflation) on contributions by individuals or political committees to candidates for statewide office. See *id.* at 903-910.

The FECA provides that "expenditures made by any person in cooperation, consultation, or concert, with" a candidate or her agents "shall be considered to be a contribution to such candidate." 2 U.S.C. 441a(a)(7)(B)(i); see *Buckley*, 424 U.S. at 46 ("controlled or coordinated expenditures are treated as contributions rather than expenditures under the Act"); *FEC* v. *National Conservative PAC (NCPAC)*, 470 U.S. 480, 492 (1985) (coordinated expenditures "are considered 'contributions' under the FECA"). That provision serves to "prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions." *Buckley*, 424 U.S. at 47; see *id.* at 46 (noting that donors might otherwise "avoid[] the contribution limitations by the simple expedient of paying directly for media advertisements or for other portions of the candidate's campaign activities"). Thus, the general

rule—which neither respondent nor the courts below have questioned in its application to persons other than political parties—is that a coordinated expenditure in support of a candidate for federal office is both statutorily and constitutionally indistinguishable from a direct payment of money to the candidate's campaign.

B. The FECA Permits Political Parties To Make Coordinated Expenditures In Support Of Their Candidates In Amounts Much Greater Than The Contribution Limits That Apply To Other Donors

As the dissenting judge in the court of appeals explained, Congress "recognize[d] the role political parties play in American politics and accorded them special treatment by permitting them to make coordinated expenditures on behalf of their federal candidates far in excess of the limits imposed on others." Pet. App. 38a (Seymour, C.J., dissenting). The effect of 2 U.S.C. 441a(d) is not to impose special disadvantages on political parties. Rather, Section 441a(d) facilitates the parties' performance of their distinctive functions by authorizing state and national party committees to make coordinated expenditures that would otherwise exceed the Act's limitations on contributions to candidates.

The Act generally prohibits any "multicandidate political committee" from making contributions in excess of $5000 to any candidate for federal office. 2 U.S.C. 441a(a)(2)(A). Section 441a(d)(1) provides, however, that, "[n]otwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions," a national or state political party "may make expenditures in connection with the general election campaign of candidates for Federal office," subject to the monetary limits set forth in Section 441a(d)(2) and (3). The Conference Report accompanying the 1976 FECA amendments explains:

> This limited permission allows the political parties to make contributions in kind by spending money for certain functions to aid the individual candidates who represent the party during the election process. Thus, but for this subsection [Section 441a(d)], these expenditures would be covered by the contribution limitations stated in subsections (a)(1) and (a)(2) of this provision.

H.R. Conf. Rep. No. 1057, 94th Cong., 2d Sess. 59 (1976). As adjusted for inflation, the coordinated party expenditure limit for the 1996 Senate election in Colorado was approximately $171,000. See p. 6, *supra*.[6]

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[6] The Presidential Election Campaign Fund Act, 26 U.S.C. 9001 *et seq.*, authorizes federal funding for presidential candidates who satisfy the statutory criteria. Under the Act, federal funds are paid directly to the candidate. 26 U.S.C. 9006(b). An earlier proposal to provide campaign funds to the political parties rather than to the candidates was changed so as to ensure, *inter alia*, that "a national committee of a political party will not be able to use control of a large Federal payment as a weapon to dictate party policies and strategies to * * * candidates and potential candidates." S. Rep. No. 714, 90th Cong., 1st Sess. 15 (1967).

Under the FECA, the national committee of a political party is permitted to make coordinated expenditures in support of its presidential candidate in an amount (two cents times the voting age population of the United States, adjusted for inflation, see 2 U.S.C. 441a(c), 441a(d)(2)) much greater than the contribution limits applicable to other donors. The court of appeals declined to address the constitutionality of the FECA limit on party coordinated expenditures in presidential campaigns. See Pet. App. 4a n.1.

C. Respondent Asserts A First Amendment Right To Make Unlimited Coordinated Expenditures In Support Of Its Federal Candidates, Including Coordinated Expenditures That Are Functionally And Constitutionally Indistinguishable From Direct Monetary Contributions

Respondent's counterclaim asserted that "the First Amendment forbids the government to limit [respondent's] coordinated expenditures. The FEC's attempts and intent to impose or enforce any limit on such coordinated expenditures are unconstitutional, unlawful, and void." J.A. 23; see J.A. 24 (requesting "[a] declaratory judgment pursuant to 28 U.S.C. § 2201 that [respondent] has the right to make unlimited expenditures from lawfully received contributions in support of its candidates for federal office, and that any limits that FECA purports to impose are invalid and void."). The district court agreed, entering a declaratory judgment "that the Party Expenditure Provision, 2 U.S.C.A. § 441a(d) (West 1997), is unconstitutional and cannot be enforced against [respondent]." Pet. App. 91a. The court of appeals affirmed, holding that "§ 441a(d)(3)'s limit on party spending is not closely drawn to the recognized governmental interest but instead constitutes an unnecessary abridgment of First Amendment freedoms." *Id.* at 25a-26a (internal quotation marks omitted). Thus, the effect of the court of appeals' decision is that respondent's coordinated expenditures in support of candidates for federal office are subject to no FECA limitation whatever.

The concept of a "coordinated expenditure" covers a variety of financial arrangements between a candidate and her supporters, many of which are functionally and constitutionally indistinguishable from direct contributions to candidates for federal office. Respondent's own expert stated, with respect to the national parties' coordinated expenditures, that "[t]he predominant approach is to provide

candidates with the funding needed to broadcast their messages or post letters to selected voters within their districts." J.A. 209. The Court in *Buckley* recognized the need "to prevent would-be contributors from avoiding the contribution limitations by the simple expedient of paying directly for media advertisements or for other portions of the candidate's campaign activities." 424 U.S. at 46. Citing *Buckley*, the plurality in *Colorado I* observed that "many [coordinated] expenditures are * * * virtually indistinguishable from simple contributions (compare, for example, a donation of money with direct payment of a candidate's media bills)." Pet. App. 111a; see also *id.* at 112a (noting that "a holding on in-fact coordinated party expenditures necessarily implicates a broader range of issues than may first appear, including the constitutionality of party contribution limits").

This Court has not attempted to define the full range of circumstances under which a campaign expenditure may properly be treated as "coordinated." The instant case, however, involves solely a facial challenge, in which respondent successfully requested a declaratory judgment that it "has the right to make unlimited expenditures from lawfully received contributions in support of its candidates for federal office, and that any limits that FECA purports to impose are invalid and void." J.A. 24. Respondent is not entitled to that relief unless the FECA limits on party coordinated expenditures are unconstitutional even as applied to expenditures that are the functional equivalent of direct contributions.[7]

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[7] Even in a First Amendment challenge,

> [f]acial invalidation "is, manifestly, strong medicine" that "has been employed by the Court sparingly and only as a last resort." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 613 (1973); see also *FW/PBS, Inc.* v. *Dallas*, 493 U.S. 215, 223 (1990) (noting that "facial challenges to legislation are generally disfavored"). To prevail, [the plaintiff] must

Thus, the question in this case is whether political parties are constitutionally entitled to a *blanket* exemption from the limits on coordinated campaign spending—squarely upheld by this Court in *Buckley*—that apply to all other entities, including other political committees. For the reasons set forth below, party committees have no such constitutional right. We explain in Part II that large coordinated expenditures by political parties pose essentially the same risks of corruption as similar expenditures by other entities. We explain in Part III that political parties do not enjoy a favored constitutional status that would entitle them to an exemption from generally applicable spending limits.[8]

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demonstrate a substantial risk that application of the provision will lead to the suppression of speech. See *Broadrick*, *supra*, at 615.

NEA v. *Finley*, 524 U.S. 569, 580 (1998). The FECA statutory limit on party coordinated expenditures "contemplates a number of indisputably constitutional applications." *Id.* at 584.

[8] As the district court correctly held (Pet. App. 74a-76a), Section 441a(d)'s application to coordinated expenditures is severable from its application (previously invalidated by this Court in *Colorado I*) to independent expenditures. The FECA provides that "[i]f any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the validity of the remainder of the Act and the application of such provision to other persons and circumstances shall not be affected thereby." 2 U.S.C. 454. There is, moreover, nothing remotely anomalous about a statutory scheme in which political parties are permitted to make unlimited independent expenditures but are subject to dollar limits on their coordinated campaign spending. To the contrary, that is precisely the regime to which individuals and non-party political committees are subject as a result of this Court's decisions in *Buckley* and its progeny. See pp. 3-4, *supra*. In the court of appeals, respondent abandoned the contention that Section 441a(d)'s application to coordinated expenditures cannot be severed from its application to independent spending. See Pet. App. 8a n.3.

II. UNLIMITED COORDINATED EXPENDITURES BY POLITICAL PARTIES IN SUPPORT OF FEDERAL CANDIDATES WOULD CREATE A SUBSTANTIAL RISK OF ACTUAL OR APPARENT CORRUPTION

As the Court explained in *Shrink Missouri*,

> [i]n speaking of "improper influence" and "opportunities for abuse" in addition to "*quid pro quo* arrangements," [the Court has] recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors. These were the obvious points behind [the Court's] recognition that the Congress could constitutionally address the power of money "to influence governmental action" in ways less "blatant and specific" than bribery.

120 S. Ct. at 905 (quoting *Buckley*, 424 U.S. at 28). It is reasonable to assume that large coordinated expenditures by political parties, like large campaign contributions generally, may be used to exert influence over legislators' behavior while in office. Indeed, the Court in *FEC* v. *Democratic Senatorial Campaign Comm. (DSCC)*, 454 U.S. 27 (1981), observed that "effective use of party resources in support of party candidates may encourage candidate loyalty and responsiveness to the party." *Id.* at 42; see also *Alaska* v. *Alaska Civil Liberties Union*, 978 P.2d 597, 626 (Alaska 1999) ("The natural tendency of successful candidates who receive unlimited contributions from a party would be to reduce independent consideration of issues and adhere to positions taken by the party itself."), cert. denied, 120 S. Ct. 1156 (2000). In enacting Section 441a(d), Congress evidently concluded that the use of campaign spending as a means of party discipline, if kept within acceptable bounds, would have salutary rather than corrosive effects. That

determination does not undermine Congress's judgment that *unlimited* party coordinated expenditures pose the same danger—*i.e.*, the risk of actual or perceived "improper influence" (*Shrink Mo.*, 120 S. Ct. at 905) based on financial largesse—as unrestricted campaign contributions by individuals or non-party committees.

The court of appeals did not question the proposition that party coordinated expenditures may be used as a means of influencing a legislator's performance of her official responsibilities. The court concluded, however, that because the essential function of parties is to facilitate the election of candidates who will implement the party's platform—a function that necessarily involves efforts to influence the behavior of the candidate once he has been elected to office —the exercise of such influence through coordinated spending cannot properly be regarded as a form of "corruption." See Pet. App. 22a ("Given the importance of political parties to the survival of this democracy, we reject the notion that a party's influence over the positions of its candidates constitutes a subversion of the political process.") (internal quotation marks omitted).

The court of appeals' analysis underestimates the potential for abuse inherent in large-scale spending by political parties, and it misconceives the underlying justification for contribution limits generally. The premise of the FECA contribution caps is not that a private person's "influence" with government officials is per se illegitimate. Rather, the premise is that such influence should not be based on large infusions of *money*. That judgment applies with full force to coordinated expenditures directed by political party officials.[9]

[9] As the Court noted in *Buckley*, the FECA's contribution limits were originally based in part on two purposes—the desire "to mute the voices of affluent persons and groups in the election process and thereby to equalize the relative ability of all citizens to affect the outcome of elections," 424 U.S. at 25-26, and the belief that "the ceilings may to some extent act as a brake on the skyrocketing cost of political campaigns and thereby serve to open the political system more widely to candidates without access to sources of large amounts of money," *id.* at 26—in addition to the prevention of actual and perceived corruption. The Court in *Buckley* held that those purposes did not constitute compelling governmental interests that could justify the Act's restrictions on independent expenditures. *Id.* at 55-57. The Court concluded, however, that "[i]t is unnecessary to look beyond the Act's primary purpose—to limit the actuality and appearance of corruption resulting from large individual financial contributions—in order to find a constitutionally sufficient justification for the $1,000 contribution limitation." *Id.* at 26.

Shortly after *Buckley* was decided, Congress amended and reenacted the FECA, including Section 441a(d)'s provisions dealing specifically with campaign expenditures by political parties. See Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475. Thus, whatever combination of factors may have initially motivated Congress to limit party expenditures, Congress chose to retain those limits after this Court's decision in *Buckley* circumscribed the constitutionally permissible objectives that could justify such caps.

A. Large Party Coordinated Expenditures May Be Used To Circumvent The FECA Limits On Individual Contributions To Candidates, And Thereby To Advance The Interests Of The Party's Major Donors

Party-coordinated expenditures often serve as a conduit to channel contributions from individuals or political action committees, to the benefit of particular candidates. If party committees were permitted to make unlimited coordinated expenditures, this use of the party as a conduit would facilitate evasion of other FECA contribution limits, and raise precisely the same potential for corruption that those limits were designed to avoid. Thus, an individual or political action committee that has already contributed the maximum $1000 or $5000 directly to the candidate could contri-

bute additional amounts to one or more party committees,[10] and could in various ways communicate the expectation that all or part of those sums would be used for coordinated expenditures in support of the candidate. When the candidate is aware of the nexus between the contribution to the party and the party-coordinated expenditures,[11] that sequence of payments creates the very danger that the underlying limits on contributions to candidates are intended to prevent—*i.e.*, the fact or appearance of "improper influence" resulting

[10] Although an individual can contribute no more than $1000 per election to a candidate for federal office, she can contribute up to $5000 to a multicandidate political committee operated by a state political party, and up to $20,000 to a political committee operated by a national political party. 2 U.S.C. 441a(a)(1)(A)-(C). A political action committee can contribute no more than $5000 per election directly to a candidate for federal office. 2 U.S.C. 441a(a)(2)(A). Such an organization can contribute additional sums of up to $15,000 to a political committee established by a national political party, and up to $5000 to a state political party committee. 2 U.S.C. 441a(a)(2)(B) and (C).

[11] As the district court recognized, evidence submitted by the FEC in this case indicates that "party committees keep track of the Member of Congress who is responsible for contributions to the campaign committees," and that "[m]any, although not all, Members of Congress raise money on behalf of the party from contributors who have already given the maximum permissible amount to the individual candidate's campaign." Pet. App. 65a. The evidence further indicates that "the parties take into consideration the fund-raising efforts of candidates in deciding allocations of campaign funds," and that "[c]andidates in need of funding do request assistance and attempt to lobby those with control over allocations." *Id.* at 66a. See also *id.* at 46a (Seymour, C.J., dissenting) ("Senators are expected to encourage their major donors, who have maximized their contribution to the candidate, to make contributions to the state or national party, which in turn gives the candidates money for their campaigns."); J.A. 165-166, 246-247, 274-275; C.A. App. 457, 635.

from payments to "politicians too compliant with the wishes of large contributors." *Shrink Mo.*, 120 S. Ct. at 905.[12]

The pertinent legislative history reflects congressional concern about the potential corruptive effects of campaign spending by political parties—and, in particular, the danger that large party contributions could be used as a means of

[12] As early as 1924, one Senate leader explained that

> "one of the great political evils of the time is the apparent hold on political parties which business interests and certain organizations seek and sometimes obtain by reason of liberal campaign contributions. Many believe that when an individual or association of individuals makes large contributions for the purpose of aiding candidates of political parties in winning the elections, they expect, and sometimes demand, and occasionally, at least, receive, consideration by the beneficiaries of their contributions which not infrequently is harmful to the general public interest. It is unquestionably an evil which ought to be dealt with, and dealt with intelligently and effectively."

United States v. *United Auto. Workers*, 352 U.S. 567, 576-577 (1957) (quoting 65 Cong. Rec. 9507-9508 (1924) (statement of Sen. Robinson)). As the dissenting judge below recognized, the current FECA limits on party coordinated expenditures reflect "long-standing Congressional concerns that have animated the history of efforts to reform federal election financing, many of which were addressed to the evils arising from large contributions to political parties that put the parties in political debt to the donors, debts which were often paid by the parties' candidates." Pet. App. 44a (Seymour, C.J., dissenting).

Of course, the means by which party leaders can influence the official behavior of their candidates in office have changed considerably since the beginning of this century. In an era when the party's nominees were chosen by the leadership rather than through primary elections, those leaders possessed a greater ability to dictate the behavior of elected officials. But as the passage quoted above makes clear, the danger at which Section 441a(d) is in part directed—*i.e.*, that party leaders will use whatever methods of influence are available to induce elected officials to take positions favorable to the party's major donors—is a matter of longstanding concern.

evading statutory limits on individual donations. That concern was expressed during Senate debate in 1973 on a predecessor bill to the one finally enacted in 1974. Senator Mathias explained:

> We have controlled the line which runs from the individual to the candidate to a $3,000 limit. We have controlled or limited the flow from a political committee to a candidate to $5,000. We have limited or controlled the line which flows from an individual to a political party to $100,000.
>
> But what this amendment really goes to is one of the areas which is not controlled, and that is from the party to the candidate. That, of course, is a wide open avenue. An [individual] who could contribute $100,000 to a party could well envision that that money, by some arrangement, would be directed to a candidate. Such arrangements are not unknown. They may be informal, but earmarking would be possible. This amendment would prevent that kind of indirect contribution of $100,000 to a single candidate by a single contributor. I think it is a loophole which needs to be looked at very carefully.

119 Cong. Rec. 26,321 (1973).[13] Senators Kennedy and Pastore observed, based on their prior experience as legislators,

[13] The amendment to which Senator Mathias referred was offered by Senator Stevenson (see 119 Cong. Rec. at 26,320) and would have had the effect of subjecting party committees to the same spending limits as other political committees. See *id.* at 26,321 (Senator Stevenson states that the amendment would "have the effect of equalizing the amount to party political committees and all other political committees"). The bill ultimately enacted in 1974 permits political parties to make substantially larger coordinated expenditures in support of federal candidates than other political committees are allowed to make. See 2 U.S.C. 441a(d); pp. 5-6, 18-19, *supra*. The FECA also places lower limits on individual contributions to candidates and to political parties than the predecessor bill discussed by Senator Mathias. See 2 U.S.C. 441a(a)(1).

that through unspoken understandings donors could achieve the result that Senator Mathias described—*i.e.*, using the party as a conduit for large contributions to candidates without any explicit earmarking of funds. See *id.* at 26,323, 26,323-26,324. Although the provisions ultimately enacted in 1974 differed in some respects from those debated during the previous year (see note 13, *supra*), the 1973 debate casts significant light on the interests that Section 441a(d) was intended to serve.

The court of appeals acknowledged (Pet. App. 22a) that "if an individual used the party as a conduit to channel money to specified candidates, this would certainly threaten the integrity of the individual contribution limit." The court suggested (*id.* at 23a), however, that concerns regarding the possible circumvention of other FECA limits could adequately be addressed through "[v]igilant enforcement of [2 U.S.C.] § 441a(a)(8)," which provides that contributions "earmarked or otherwise directed through an intermediary or conduit" shall be treated as contributions to the candidate herself. This Court has previously recognized, however, that the earmarking provision of Section 441a(a)(8) does not provide a complete response to the danger that contributions to political committees may be used to evade the FECA limits on contributions to candidates.

Thus, in *Buckley*, the Court upheld the FECA's $25,000 annual aggregate limit on individual contributions, despite the fact that it imposed "an ultimate restriction upon the number of candidates and committees with which an individual may associate himself by means of financial support." 424 U.S. at 38. The Court explained that the $25,000 aggregate limit was "a corollary of the basic individual contribution limitation" that restricts the possibility of evasion "by a

person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party." *Ibid.* The Court employed a similar analysis in *California Medical Ass'n*, where it upheld the $5000 limit on contributions to political committees, see 2 U.S.C. 441a(a)(1)(C), as a reasonable means of preventing circumvention of the limits on contributions to candidates. The plurality explained that if contributions to political committees were unrestricted, "an individual or association seeking to evade the $1,000 limit on contributions to candidates could do so by channelling funds through a multicandidate political committee." 453 U.S. at 198. The plurality found it "clear that this provision is an appropriate means by which Congress could seek to protect the integrity of the contribution restrictions upheld by this Court in *Buckley*." *Id.* at 199. Justice Blackmun similarly "conclude[d] that contributions to multicandidate political committees may be limited to $5,000 per year as a means of preventing evasion of the limitations on contributions to a candidate or his authorized campaign committee upheld in *Buckley*." *Id.* at 203 (Blackmun, J., concurring). Those decisions refute the court of appeals' suggestion (see Pet. App. 23a) that "[v]igilant enforcement of § 441a(a)(8)" is the only constitutionally

permissible means of preventing the use of intermediaries to circumvent the individual contribution limits.[14]

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[14] As the dissenting judge in the court of appeals observed, "[t]he record [in this case] * * * reveals that although earmarking funds for a particular candidate is illegal, this prohibition is circumvented through 'understandings' regarding what donors give what amounts to the party, which candidates are to receive what funds from the party, and what interests particular donors are seeking to promote." Pet. App. 46a (Seymour, C.J., dissenting). A former official of the Democratic Senatorial Campaign Committee (DSCC) explained that "[t]he Senators who solicited the money for the DSCC could not promise that the money would be used directly in support of their own or another particular campaign, because earmarking contributions was prohibited. However, that did not mean that Senators who raised money could not be assured that they would get a significant return from their efforts. There appeared to be an understanding between the DSCC and the Senators that the amount of money they received from the DSCC was related to how much they raised for the Committee." J.A. 165-166; see J.A. 166 (same former official states that "[p]eople often contribute to party committees because they have given the maximum amount to a candidate, and want to help the candidate indirectly by contributing to the party"). Another individual who had served first as a Democratic Party official and then as National Finance Director for Tim Wirth's 1986 Senate campaign explained that the DSCC employed a "tally system," which he described as "an informal agreement between the DSCC and the candidates' campaigns that if you help the DSCC raise contributions, we will turn around and help your campaign." J.A. 246. He stated that during the 1986 Senate race, "[w]e also told contributors who had made the maximum allowable contribution to the Wirth campaign but who wanted to do more that they could raise money for the DSCC so that we could get our maximum § 441a(d) allocation from the DSCC." J.A. 247. Senator Wirth himself stated, "[w]hen I solicited contributions for the state party, in effect I solicited funds for my election campaign. I understood that the solicitees who made contributions to the party almost always did so because they expected that the contributions would support my campaign one way or another, and for the most part they expected I would remember their contributions." J.A. 273. A former campaign aide to Senator Wyche Fowler explained that "[i]n raising money for the DSCC, we mostly went back to contributors who had already given the maximum allowable

Under current federal law, moreover, an individual may donate unlimited amounts of so-called "soft money" to political parties. See Pet. App. 102a. Because "soft money" cannot lawfully be spent to influence federal elections, the party cannot (even under the court of appeals' decision) use those donations to make coordinated expenditures on behalf of candidates for federal office. Large soft money donations may, however, be used to induce the party to make large coordinated expenditures with funds acquired from other ("hard money") sources.[15] Those coordinated expenditures may in turn be used to induce elected officials to look favorably upon the soft money donor. The FECA limits on party coordinated expenditures serve to break that chain, thereby helping to prevent circumvention of the statutory limits on individual contributions to candidates.

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contribution to Mr. Fowler's campaign. While we were not able to tell these contributors that the money could come back directly to help us, we knew that this was part of the effort to demonstrate our viability to the DSCC, to show that we were worthy of their help. In that way the money contributed was certainly an indirect help to Mr. Fowler." C.A. App. 457. Former Senator Paul Simon testified in his deposition that "[t]he tally system is a way of contributing that does not violate the law [against earmarking] but comes close to violating the law. * * * They always made clear that this is not just automatic, so no one could say if Tom Smith contributed $5,000 to the DSCC, that was a way of laundering it coming to Paul Simon, but you knew that if you got your tally, even though you might be in a safe seat, you would get your money." *Id.* at 635.

[15] One former Democratic Party official explained that "[i]f people start giving $50,000, $100,000, or $500,000 to a party committee, even if that is soft money, they would probably expect a greater voice in how that money was spent and what they would want in return. It is unrealistic to think that if I give you a check for $500,000, I will not expect you to make the largest possible contribution to my favorite candidate who can do the most for my legislative concerns." J.A. 260.

B. Large Coordinated Expenditures May Be Used To Advance The Interests Of The Individual Party Officials Who Control The Disposition Of Party Funds

"In the nature of things, a [party] committee must act through its employees and agents." *DSCC*, 454 U.S. at 33. Even when party funds are raised from a large number of contributors, the record in this case indicates that small groups of party officials may have de facto control over the manner in which those funds are spent. See J.A. 164 (former Executive Director of the Democratic Senatorial Campaign Committee (DSCC) explains that during his tenure, the DSCC's three-member Executive Committee "basically made the decisions as to how to distribute the money"). As a result, candidates who benefit from large coordinated expenditures may feel indebted not to the party as an abstract entity, but to the individual party officials who cause those expenditures to be made. Party leaders may thereby acquire the ability to induce the candidates (once elected or re-elected) to take actions favorable to the leaders' own private interests or policy preferences.[16]

There is no reason to believe that political party officials are immune from the corrupting temptations and self-interest of other persons. To the contrary, history demonstrates

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[16] The two major parties' senatorial campaign committees have traditionally been headed by incumbent Senators chosen by the parties' Senate leadership. See J.A. 163-164, 246, 249, 252, 253, 262-263, 275-276; C.A. App. 486. As the DSCC's former Executive Director explained, "[t]aking away the limits on coordinated expenditures would result in a fundamental transferal of power to certain individual Senators." J.A. 168. Reasonable people may disagree regarding the appropriate balance between leadership control and individual discretion within a legislative body. But party leaders within the legislature cannot plausibly claim a constitutional *right* to utilize large coordinated expenditures in support of other candidates as a means of strengthening their control.

that individual officials of political organizations are particularly well-situated to exert a corrupting influence upon candidates and officeholders in order to advance their private interests. See generally, *e.g.*, *Rutan* v. *Republican Party of Ill.*, 497 U.S. 62, 88 n.4 (1990) (Stevens, J., concurring). The court of appeals acknowledged that "political parties have been involved in wrongdoing, dating back to the Tammany Hall machine," but it concluded (without citation) that "the electoral and litigation processes have always managed to right these wrongs." Pet. App. 22a. The propriety of the FECA's coordinated expenditure limits does not depend, however, on proof that without such limits electoral abuses would permanently go unchecked. Nor does it depend on proof that party officials will typically utilize their control over party funds to advance a personal agenda. The Court in *Buckley* assumed "that most large contributors do not seek improper influence over a candidate's position or an officeholder's action." 424 U.S. at 29. The Court nevertheless sustained the $1000 limit on individual contributions, explaining that it is "difficult to isolate suspect contributions," and that "Congress was justified in concluding that the interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated." *Id.* at 30; see *National Right to Work Comm.*, 459 U.S. at 210 (Court will not "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared").

C. Congress May Impose Reasonable Contribution Limits In Order To Reduce The Influence Of Money On The Behavior Of Elected Officials, Regardless Of The Motivation Of The Donor

As the foregoing analysis indicates, large party coordinated expenditures may be used to induce elected officials to

favor the private interests either of the party's major contributors or of individual party officers. Use of coordinated expenditures to achieve those ends is a paradigmatic example of the "improper influence" (*Shrink Mo.*, 120 S. Ct. at 905) that the FECA contribution limits are intended to prevent. But the validity of Section 441a(d) does not ultimately depend upon the likelihood of such blatant abuses. Even when individual party leaders conscientiously seek to further the interests and values of the membership as a whole, Congress may legitimately choose to limit the extent to which large infusions of *money* may be used to achieve those objectives.

As the Court explained in *Shrink Missouri*,

> [i]n speaking of "improper influence" and "opportunities for abuse" in addition to "*quid pro quo* arrangements," [the Court has] recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors. These were the obvious points behind [the Court's] recognition that the Congress could constitutionally address the power of money "to influence governmental action" in ways less "blatant and specific" than bribery.

120 S. Ct. at 905 (quoting *Buckley*, 424 U.S. at 28). Congress's authority to "address the power of money 'to influence governmental action'" (*ibid.*) does not depend on the motivation of the donor. The wealthy individual who pays a large sum as an explicit *quid pro quo* for a legislator's vote is guilty of bribery, whether the payor has a pecuniary or similar tangible interest in the passage or defeat of the proposed legislation, or instead is motivated solely by ideological concerns. With respect to methods "less 'blatant and specific' than bribery" (*ibid.*), Congress has similarly concluded that the undue influence of large campaign

contributions upon public policy is inherently subversive of democratic governance, regardless of the donor's motives.

In explaining its conclusion that party coordinated expenditures are unlikely to have corruptive effects, the court of appeals stated that

> [t]he opportunity for corruption or its appearance is greatest when the political spending is motivated by economic gain. * * * [P]olitical parties are diverse entities, one step removed from the candidate, and they exist for noneconomic reasons. Much like an advocacy group, a party functions "to disseminate political ideas, not to amass capital."

Pet. App. 13a (quoting *Massachusetts Citizens for Life*, 479 U.S. at 259). The distinction drawn by the court of appeals has no basis in law. Neither the text of the FECA nor this Court's precedents suggest that the applicability or constitutional status of the Act's coordinated expenditure limits turns on whether the overall character of the contributing organization, or its motive in making a specific expenditure, is economic in nature.[17]

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[17] One commentator explains:

> FECA's dollar limits on individual and PAC contributions apply equally to donations by advocacy organizations or ideologically-minded individuals as to organizations and individuals with economic agendas for giving. The Supreme Court has never suggested that ideological contributions are constitutionally immune from dollar limitation. There is thus no basis in the Supreme Court's campaign finance jurisprudence for [the court of appeals'] determination [in this case] that restrictions on party contributions are subject to more stringent scrutiny because parties are ideological organizations—even if it is assumed that the parties are primarily ideological organizations.

Richard Briffault, *The Political Parties and Campaign Finance Reform*, 100 Colum. L. Rev. 620, 664 (2000).

The court of appeals' reliance on *Massachusetts Citizens for Life* is wholly misplaced. The Court in that case relied on the distinctive attributes of a particular corporate entity—including the fact that the organization "was formed for the express purpose of promoting political ideas, and cannot engage in business activities," 479 U.S. at 264—as a basis for holding that the organization was constitutionally entitled to make *independent* campaign expenditures. Of course, under this Court's decision in *Colorado I*, party committees are similarly free to make unlimited independent expenditures in support of their candidates for federal office. But nothing in *Massachusetts Citizens for Life* suggests that an organization's "political" (as opposed to "economic") orientation entitles it to a constitutional exemption from the FECA limits on *coordinated* campaign spending. To the contrary, the Court in *Massachusetts Citizens for Life* specifically distinguished its prior decision in *National Right to Work Committee* on the ground that "the political activity at issue in that case was contributions," and it observed that the Court "ha[s] consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending." 479 U.S. at 259-260.

The court of appeals also stated that "[p]olitical parties today represent a broad-based coalition of interests, and there is nothing pernicious about this coalition shaping the views of its candidates." Pet. App. 21a; see *id.* at 22a ("we reject the notion that a party's influence over the positions of its candidates constitutes a subversion of the political process") (internal quotation marks omitted). The court was surely correct in stating that political parties may legitimately seek to influence the official behavior of their members. There is no inconsistency, however, between that principle and the imposition of reasonable coordinated spending limits.

The justification for imposing contribution limits upon individuals or non-party political committees is not that persons outside the government should be prevented from exerting "influence" over federal policy. To the contrary, individuals have a constitutional right "to petition the Government for a redress of grievances," U.S. Const. Amend. I, and "to engage in association for the advancement of beliefs and ideas," *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958); see also *NCPAC*, 470 U.S. at 498 ("The fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for by the PACs can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view."). The FECA limits on contributions made by individuals and non-party political committees reflect Congress's judgment that a legislator's conduct should not be affected by an actual or anticipated infusion of *money*—not a suspicion of private influence per se. That judgment is no less applicable to political parties than to other potential donors.[18]

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[18] As Justice Thomas explained in his separate opinion in *Colorado I*, "[t]he very aim of a political party is to influence its candidate's stance on issues and, if the candidate takes office or is reelected, his votes." Pet. App. 138a (518 U.S. at 646). It does not follow, however, that a political party is incapable of "corrupting" its candidates. No one (to our knowledge) suggests, for example, that a party committee has a constitutional right to offer money as an explicit *quid pro quo* for a legislator's vote on a particular measure. Although the party's *objective* of influencing the official behavior of its candidates is wholly legitimate, the federal bribery laws validly limit the *means* by which that objective may be achieved. Cf. Thomas F. Burke, *The Concept of Corruption in Campaign Finance Law*, 14 Const. Comm. 127, 138 (1997) ("The reason we make bribery illegal is that we don't want officials to be affected by monetary considerations, not that we have a particular animus against deal-making."). The congressional policy judgment reflected in Section 441a(d)—*i.e.*, that a party committee should have only a limited ability to use coordinated campaign expenditures as a *means* of influencing its members—is similarly valid.

III. POLITICAL PARTIES HAVE NO FAVORED CONSTITUTIONAL STATUS THAT WOULD ENTITLE THEM TO AN EXEMPTION FROM THE SPENDING LIMITATIONS THAT APPLY TO OTHER POTENTIAL DONORS

In deciding how to exercise his official responsibilities, a Member of Congress will be influenced by a wide variety of considerations. Those will include the Member's own moral and political values and her independent perception of the public interest; the views of her constituents; the beliefs of prominent persons (*e.g.*, major employers, union leaders, newspaper publishers and editors) within the State or district; and the preferences of party leaders. Neither history nor precedent suggests that political party committees have a favored constitutional status that would entitle them to utilize a mode of influence—large coordinated expenditures in support of candidates for federal office—that other participants in the public dialogue are forbidden to employ.

A. The Framers Distrusted Political Parties And Did Not Intend To Vest Them With Any Favored Constitutional Status

"Partisan politics bears the imprimatur only of tradition, not the Constitution." *Elrod* v. *Burns*, 427 U.S. 347, 369 n.22 (1976) (plurality opinion). Commenting on the political beliefs of such men as Washington, Adams, Madison, Hamilton, and Jefferson, the historian Richard Hofstadter has written: "If there was one point of political philosophy upon which these men, who differed on so many things, agreed quite readily, it was their common conviction about the baneful effects of the spirit of party." Richard Hofstadter, *The Idea of a Party System* 3 (1970). The Framers "equated parties

with divisiveness, disruption, and conspiracy against government. The Constitution had not anticipated parties and had made no provision for their existence. In the *Federalist* papers Madison had stressed the argument that the Constitution would, in fact, control 'the violence of faction.'" Noble E. Cunningham, Jr., "The Jeffersonian Republican Party," in 1 *History of U.S. Political Parties* 240 (A. Schlesinger ed., 1973); see The Federalist No. 10, at 77 (J. Madison) (Clinton Rossiter ed., 1961).

Any reference to the Framers' distrust of political parties is subject to at least two important caveats. First, although the Framers were concerned about the potentially deleterious effects of parties, they did not seek to suppress partisan activity directly. Rather, recognizing that direct suppression of parties would entail unacceptable threats to liberty,[19] they sought instead to devise governmental structures that would have the practical effect of curtailing the parties' influence. As one eminent political scientist has explained:

> [T]he Convention at Philadelphia produced a constitution with a dual attitude: it was proparty in one sense and antiparty in another. The authors of the Constitution refused to suppress the parties by destroying the fundamental liberties in which parties originate. They or their immediate successors accepted amendments that guaranteed civil rights and thus established a system of party tolerance, i.e., the right to agitate and to organize. This is the proparty aspect of the system. On the other hand, the authors of the Constitution set up an elaborate division and balance of powers within an intricate governmental structure designed to make parties ineffective. It was hoped that the parties would lose and exhaust themselves in futile attempts to fight their way through the labyrinthine framework of the government, much as an attacking army is expected to spend itself against the defensive works of a fortress. This is the antiparty part of the constitutional scheme.

E.E. Schattschneider, *Party Government* 7 (1942) (footnotes omitted).

Second, notwithstanding the Framers' philosophical objections to political parties, partisan activity has been an important feature of American political life for nearly all of the Nation's history. "The formation of national political parties was almost concurrent with the formation of the Republic itself." *California Democratic Party* v. *Jones*, 120 S. Ct. 2402, 2408 (2000); see Cunningham, *supra*, at 240 ("In a single decade, then, the nonparty conditions which had existed when Washington took office had been replaced by a two party system"); Hofstadter, *supra*, at 4 (although "[t]he Founding Fathers had inherited a political philosophy which * * * denied the usefulness of parties and stressed their dangers," the Framers "deeply believed in the necessity of checks on power, and hence in freedom for opposition, and were rapidly driven, in spite of their theories, to develop a party system.").

Thus, the historical evidence amply supports this Court's repeated holdings (see, *e.g.*, *California Democratic Party*,

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[19] Thus, Madison acknowledged that one possible "method[] of removing the causes of faction" was to "destroy[] the liberty which is essential to its existence." The Federalist No. 10, *supra*, at 78. Madison vigorously opposed that approach, however, explaining:

> It could never be more truly said than of [that] remedy that it was worse than the disease. Liberty is to faction what air is to fire, an aliment without which it instantly expires. But it could not be a less folly to abolish liberty, which is essential to political life, because it nourishes faction than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.

Ibid.

120 S. Ct. at 2408; *Tashjian* v. *Republican Party of Conn.*, 479 U.S. 208, 214 (1986)) that the freedom of speech and association protected by the First Amendment encompasses the right to form and operate a political party. The question in the instant case, however, is whether the First Amendment entitles political parties not only to exist and to advocate, but also to an exemption from the coordinated spending limits that apply to other organizations, including organizations whose principal function is political advocacy. The drafting and ratification history of the Constitution provides no support for that proposition. The Framers regarded political parties as an inevitable feature of a free society, but they did not intend to create special privileges or incentives for partisan activity.

As we explain above, the evil at which the FECA spending limits are directed is not private influence per se, but influence exerted through financial largesse. Respondent asserts a constitutional right not simply to exert "influence over the positions of its candidates" (Pet. App. 22a), but to employ a *means* of influence that is forbidden to other participants in the political fray. Reasonable people may surely believe that the stability and efficacy of the federal government will be increased if elected officials are encouraged, in balancing the demands of competing constituencies (see p. 39, *supra*), to display primary loyalty to the party leadership. But the Framers clearly did not intend to enshrine that preference in the Constitution.

B. The Formal Role Of Political Parties In The States' Electoral Process Has Traditionally Been Treated As A Ground For Increased State Regulation, Not As A Basis For Heightened First Amendment Protection

The FECA defines the term "political party" to mean "an association, committee, or organization which nominates a candidate for election to any Federal office whose name appears on the election ballot as the candidate of such association, committee, or organization." 2 U.S.C. 431(16). Thus, under the Act, the distinguishing feature of a political party (as opposed to other organizations that endorse candidates for federal office and spend money in their support) is that the candidate is officially identified, on the ballot, as the party's nominee.

The modern practice, in Colorado and among the States generally, is that the major political parties are entitled by law to have their nominees placed upon the ballot, and the candidates are identified on the ballot by party affiliation.[20]

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[20] One commentator explains that the States typically "grant[] preferential ballot access to the nominees of political parties, thereby making party nomination a kind of 'feeder' into the state's official political system. Every state grants access to the general election ballot to the nominees of political parties that satisfy certain conditions, conditions that typically differ from those that independent candidates must satisfy." Laurence H. Tribe, *American Constitutional Law* § 13-23, at 1121 (2d ed. 1988). Under Colorado law, the nominees of all "political parties" are placed on the ballot for all "partisan elections." Colo. Rev. Stat. Ann. § 1-5-404(1) (West Supp. 1996); see *id.* § 1-1-104(23.6) (West Supp. 1996) (defining the term "partisan election" to mean "an election in which the names of the candidates are printed on the ballot along with their affiliations"). All elections for federal office conducted in Colorado are "partisan elections." *Id.* § 1-4-502(1) (1973 & West Supp. 1996). The term "political party" is defined to mean "any political organization whose candidate at the last preceding gubernatorial election received at least ten percent of the total gubernatorial vote cast." *Id.* § 1-1-104(25) (West Supp. 1996). Colorado law also es-

But nothing in the Constitution mandates that approach. Consistent with the Constitution, the States might choose instead to make ballot access contingent for all candidates on the submission of a particular number of signatures. The States might also decide that candidates should be listed on the ballot by name alone, without reference to party or other group affiliation. Under such a system, individuals would retain their First Amendment right to associate for the purpose of endorsing and supporting particular candidates or slates of candidates. But the identification of the candidate with the association on the ballot itself—the feature that (under the FECA) distinguishes political parties from other advocacy groups—is the product of state discretion rather than constitutional command.

Neither logic nor precedent suggests that a State's decision to give an organization official recognition on the ballot expands the organization's First Amendment rights by eliminating Congress's authority to impose coordinated spending limits that are validly applied to non-party political committees.[21] To the contrary, when a political party assumes an official role in the State's electoral machinery, it is typically subject to *greater* constraints than a political organization acting in a purely private capacity. This Court has held that "when a State prescribes an election process that gives a special role to political parties," the parties'

tablishes a petition procedure for placing on the ballot the names of "[c]andidates for partisan public offices * * * who do not wish to affiliate with a political party," *id.* § 1-4-802(1) (West Supp. 1996), and provides for write-in voting as well, see *id.* § 1-4-1101 (West Supp. 1996).

[21] Of course, respondent could in theory propose a definition of "political party" other than that contained in the FECA, and could contend that political parties (so defined) are constitutionally entitled to an exemption from the coordinated expenditure limits that apply to other donors. But neither respondent nor the courts below have suggested an alternative method of distinguishing a "party" from a non-party political committee.

conduct may for certain purposes be attributed to the State itself, thereby subjecting the parties to constitutional requirements that would not apply to wholly private actors. *California Democratic Party*, 120 S. Ct. at 2407. More generally, the "States have a major role to play in structuring and monitoring the election process, including primaries," *id.* at 2406, and in performing that responsibility the State has significant latitude to regulate the political parties' internal decisionmaking processes. The Court has "considered it 'too plain for argument,' for example, that a State may require parties to use the primary format for selecting their nominees, in order to assure that intraparty competition is resolved in a democratic fashion." *Id.* at 2407 (quoting *American Party of Tex.* v. *White*, 415 U.S. 767, 781 (1974)).[22]

Notwithstanding their involvement with the State's electoral machinery, political parties retain a significant private character, and a corresponding right to invoke the guarantees of the Constitution. This Court has squarely rejected "the proposition that party affairs are public affairs, free of First Amendment protections." *California Democratic Party*, 120 S. Ct. at 2407. As we emphasize above, however, the FECA restrictions at issue in this case do not impose special restrictions on a party's efforts to support its nominees, but instead permit party-coordinated expenditures in amounts substantially greater than the limits that apply to

[22] In considering constitutional challenges to state ballot-access restrictions, the Court has similarly recognized that the States have significant (though not unlimited) discretion to impose reasonable limits in order to prevent voter confusion and preserve the stability of its political system. See, *e.g.*, *Timmons* v. *Twin Cities Area New Party*, 520 U.S. 351, 357-370 (1997); *Norman* v. *Reed*, 502 U.S. 279, 288-296 (1992); *Munro* v. *Socialist Workers Party*, 479 U.S. 189, 193-199 (1986); *Anderson* v. *Celebrezze*, 460 U.S. 780, 786-806 (1983); *Storer* v. *Brown*, 415 U.S. 724, 728-746 (1974); *Jenness* v. *Fortson*, 403 U.S. 431, 434-442 (1971); *Williams* v. *Rhodes*, 393 U.S. 23, 30-35 (1968).

other donors. Respondent claims not merely a First Amendment right to engage in political association and advocacy, but a First Amendment right to a complete exemption from the campaign spending limits that apply (and that have been upheld by this Court as applied) to other would-be donors. Because the quasi-official status of political parties has traditionally been regarded as a justification for *increased* regulation of their affairs (in comparison to those of other advocacy groups), respondent's theory is unsupported by this Court's precedents.

State regulation of the party nominating process, like the FECA limits on party coordinated expenditures, has historically served to reduce the power of the party hierarchy and to promote candidate responsiveness to a broader constituency. "The Progressive Era laws that shifted control over nominations from party committees and conventions to primaries constituted an effort to reduce the influence of party organizations over party candidates, presumably reflecting the notion that candidates (and elected officials) would embrace different positions on issues of public importance if they were less beholden to party officials." Richard Briffault, *Campaign Finance, the Parties, and the Court*, 14 Counts. Comm. 91, 117 (1997). If the First Amendment permits the States to pursue that objective by imposing rules on party governance that have no counterpart with respect to other political associations, Congress can surely subject the parties to spending limits that are similar in kind to (and less stringent than) the caps that apply to political committees generally.

C. Legislative Judgments Regarding The Appropriate Balance Between The Maintenance Of A Vigorous Party System And The Prevention Of Corruption Are Entitled To Substantial Deference

As the dissenting judge in the court of appeals observed, "determining which measures suitably balance the nurture of political parties and the prevention of their use as tools of corruption is a matter for the legislative rather than the judicial process." Pet. App. 39a (Seymour, C.J., dissenting); see also *id.* at 50a ("*As a matter of common sense, it is difficult to credit the bald assertion that politicians do not understand the role political parties play in American politics.*"); *Shrink Mo.*, 120 S. Ct. at 912 (Breyer, J., concurring) ("Where a legislature has significantly greater institutional expertise, as, for example, in the field of election regulation, the Court in practice defers to empirical legislative judgments."); cf. *FEC* v. *National Right to Work Comm.*, 459 U.S. 197, 209 (1982) (Congress's "careful legislative adjustment of the federal electoral laws * * * to account for the particular legal and economic attributes of corporations and labor organizations warrants considerable deference").

By vesting political parties with a preferred constitutional status, respondent would disable Congress and the States from imposing limits on the parties' campaign spending.[21]

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[21] In *Missouri Republican Party* v. *Lamb*, 227 F.3d 1070 (8th Cir. 2000), a divided panel of the Eighth Circuit recently held that a state-law limitation on cash and in-kind contributions by political parties to candidates violates the party's First Amendment rights. The court rejected Missouri's contention that the contribution limit serves to prevent actual or apparent political corruption, stating that "it is not easy to see how a party could 'corrupt' one of its own candidates, since, on account of their general unity of purpose, they are committed, in the main, to the same aims and principles." *Id.* at 1073. The court relied in part on the Tenth Circuit's decision in the instant case. See *id.* at 1072, 1073. The dissenting

Although this Court has recognized the substantial public and governmental interest in the effective functioning of our current two-party system, see, *e.g.*, *Timmons* v. *Twin Cities Area New Party*, 520 U.S. 351, 366-367 (1997); *Davis* v. *Bandemer*, 478 U.S. 109, 144-145 (1986) (O'Connor, J., concurring), federal and state legislatures have traditionally enjoyed significant latitude to determine how that interest is best effectuated and how it is appropriately balanced against competing objectives. Acceptance of respondent's constitutional argument, by contrast, would sharply restrict legislative authority to define and limit the appropriate role of the parties vis-à-vis other participants in the political fray.[24]

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judge would have upheld the law on the ground that "contributions made by a political party are no different than contributions made by individuals or other groups." *Id.* at 1077 (John R. Gibson, J., concurring and dissenting). He concluded that "[b]ecause Missouri's limits on cash contributions that a party may make to a candidate are closely drawn to meet a sufficiently important governmental interest, they do not violate the First Amendment." *Ibid.*

[24] One commentator explains:

> In essence, the question of whether party committee coordinated spending raises a danger of parties corrupting candidates is really a question of how much or how little potential for influence parties ought to be allowed to have over their candidates' campaigns—and whether Congress or the Court should decide this. Certainly, elected officials seem to be in a much better position to consider and combine the multiple and often conflicting values of candidate autonomy, party responsibility, voter participation, and the potential for parties to serve as conduits for special interest influence. Elected officials are more likely to understand the impact of the campaign finance laws on the political process and the interaction of party spending with other campaign finance laws and governance generally.

Briffault, *Campaign Finance, the Parties, and the Court*, 14 Const. Comm. at 118-119. Professor Briffault notes that "there is no reason to believe that elected officials are likely to be hostile to party interests," since "[t]he vast majority of elected federal and state officials are elected on party lines and nearly all carry major party labels." *Id.* at 119. He

With respect to federal elections, Congress has specifically addressed the subject of campaign spending by political parties and has attempted to draw an appropriate balance between competing objectives. See 2 U.S.C. 441a(d). Recognizing the distinctive role that political parties have come to play in our system of government, Congress has authorized party committees to make coordinated expenditures in amounts much greater than the limits that apply to other donors. Congress has declined, however, to leave party campaign spending wholly unconstrained. Because an Act of Congress comes to this Court with a presumption of constitutionality; because the Court has already upheld against First Amendment challenge the more stringent coordinated spending limits applicable to non-party organizations; and because Members of Congress are neither ignorant of the practical needs of political parties nor hostile to their interests, that legislative judgment should be sustained.

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acknowledges the existence of "considerable scholarly support for a party-centered campaign finance system as a step toward creating a more 'responsible' two-party system, with attendant benefits for government performance and responsiveness." *Id.* at 118. He concludes, however, that "[a] party-centered system might very well be a good idea. But it would be a major departure from past and present practice. And it is hard to believe that the decision whether to have a party-centered or candidate-centered system is a question of constitutional law, to be decided by the Supreme Court, rather than a preeminently political question to be decided by Congress." *Id.* at 120.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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DECEMBER 2000

RESPONDENT'S

BRIEF

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IN THE

Supreme Court of the United States

FEDERAL ELECTION COMMISSION,
Petitioner,

v.

COLORADO REPUBLICAN FEDERAL
CAMPAIGN COMMITTEE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Tenth Circuit

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OPINIONS AND ORDERS BELOW

The May 5, 2000, opinion of the United States Court of Appeals for the Tenth Circuit is reported at 213 F.3d 1221 and is reproduced at Pet. App. 1a-53a. It affirmed the February 18, 1999 order and memorandum decision of the United States District Court for the District of Colorado, reported at 41 F. Supp. 2d 1197 and reproduced at Pet. App. 54a-91a that, on remand, declared unconstitutional the limits imposed upon coordinated party spending by 2 U.S.C. § 441a(d)(3).

The June 26, 1996 opinion of this Court, referred to herein as *Colorado I*, is reported at 518 U.S. 604 and is reproduced at Pet. App. 92a-142a. *Colorado I*, which held that political parties freely may engage in independent speech, also vacated the first opinion of the Court of Appeals in this matter, which is reported at 59 F.3d 1015 (Pet. App. 143a-162a), and remanded for further development the issue of the constitutionality of limits on coordinated party spending.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution, the Party Expenditure Provision of the Federal Election Campaign Act of 1971, as amended ("FECA"), 2 U.S.C. § 441a(d), as well as other relevant parts of FECA, appear in the Brief for Petitioner ("FEC Brief") at 2-3.[1] A further provision of FECA, not found in the FEC Brief, is the "Anti-Earmarking Provision," § 441a(a)(8), which states that:

> For purposes of the limitations imposed by this section, all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including

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[1] Section references within this brief are to Title 2 of the United States Code unless otherwise noted.

contributions which are in any way earmarked through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate. The intermediary or conduit shall report the original source and the intended recipient of such contribution to the Commission and to the intended recipient.

STATEMENT OF THE CASE

Preliminary Statement

The Colorado Republican Federal Campaign Committee ("Colorado Party") would face serious criminal penalties if, in cooperation or consultation with its own candidate for Congress, it were to pay for a single letter to each eligible Colorado voter, or even to each registered Colorado Republican, explaining how electing that candidate would advance the Party's platform and values. The Party Expenditure Provision limits at issue in this case, § 441a(d)(3), forbid a party to spend more than 7 cents per voter in cooperation or consultation with, or at the request of, its own candidate for Senate or the House of Representatives.[2] Since postage alone is 34 cents per first class letter, and postage is but a fraction of the cost of a mailing, even a single coordinated letter to each voter is a crime.

[2] The 2000 Senate Limits appear in the FEC *Record* (Vol. 26, No. 3, March 2000), at 15, available at <www.fec.gov>. The limit varies widely, from a low of $67,560 for Delaware, Hawaii, Idaho, Montana, New Hampshire, North Dakota, Rhode Island, South Dakota, and Vermont to $1,636,438 for California, $929,355 for New York, and $967,797 for Texas. Colorado's 2000 Senate limit was $202,072. The House limit is $33,780 in most states, but is double that ($67,560) in states with only one representative, i.e., Alaska, Delaware, Montana, North Dakota, South Dakota, Vermont, and Wyoming. These limits apply separately to state and national party committees. A state committee may assign its limit to the national committee, or vice versa. *See, FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27 (1981).

These stringent limits on a party's coordinated political speech apply even though the Party may spend only "hard money" to fund coordinated speech. Hard money consists of voluntary contributions that a party receives in limited amounts (typically under $100) from individuals and political committees (not corporations and labor unions), and that are fully reported and publicly disclosed pursuant to FECA. Disclosures are accessible online at <www.fec.gov> and <www.tray.com>. So-called "soft money" is not regulated as to amount and source, but it cannot be used for coordinated speech and is not at issue here.[3]

The Colorado Party grounds its First Amendment challenge to the Party Expenditure Provision on three propositions. First, requiring a political party to sever its natural, strong, pre-existing ties to its candidate as the price of unrestricted political speech directly, substantially, and uniquely burdens the party's core First Amendment rights. Second, assuming arguendo that a sufficiently compelling showing might sustain such a burden, the FEC has not made such a showing—despite having many years to do so. Third, even if a sufficient interest were shown, FECA's limits on coordinated party speech are not closely drawn to the interests asserted.

For these reasons, the Colorado Party contends, and the Tenth Circuit and the district court agree, that FECA's stringent categorical limit on coordinated party speech cannot stand.

This Court's Earlier Ruling And Remand

In *Colorado I* this Court held that the First Amendment invalidated FECA's restrictions on a political party's use of hard money to fund its independent speech on behalf of its candidates. Four Justices also were prepared to hold

[3] "Soft money" is not a term of art. In this brief, it describes funds that are not subject to FECA prohibitions or dollar limits and are received by national party committees. Nonfederal state party receipts, however, are regulated by applicable state law.

immediately that FECA's restrictions on coordinated speech are invalid. (Pet. App. 114a, 119a). The controlling plurality, however, preferred to remand the issue of coordinated spending restrictions for further factual and legal development. (Pet. App. 113a).

On remand the district court allowed the FEC a further year and a half of discovery to supplement the four years of discovery previously allowed. Thus, the FEC had a total of five and one-half years of discovery to develop evidence to justify the Party Expenditure Provision limits.

The FEC's discovery effort was extensive and exhaustive. It included interviews with many persons involved in the political process, preparation of their declarations, submission of expert reports, and depositions of political party leaders and experts. The FEC also subpoenaed documents from many third parties.

FECA's Party Expenditure Provision

FECA acknowledges that the relationship between political parties and their candidates is unique. It defines "political party" as an association that "nominates a candidate for election to any Federal office whose name appears on the election ballot as the candidate of such association . . ." § 431(16).[4] Moreover, subsection (1) of the Party Expenditure Provision "exempt[s] political parties from the general contribution and expenditure limitations," *Colorado I*, Pet. App. 96a, stating that a party may make expenditures "[n]otwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions." § 441a(d)(1). There is no dispute that the term

[4] FECA also defines "national committee" and "state committee" of political parties. §§ 431(14), (15). Such party committees are distinct from political action committees (PACs), which FECA refers to as "separate segregated funds." *See* § 431(4)(B).

"expenditures" in this provision includes expenditures that a party coordinates with its congressional candidates.[5]

The Party Expenditure Provision sets limits on party expenditures, including coordinated expenditures, that, adjusted for inflation, allow only about 7 cents per voter, as is discussed above. *See* § 441a(d)(3).[6] In setting these limits, Congress balanced its purpose of "reducing what it saw as wasteful and excessive campaign spending" against its goal of maintaining "an important and legitimate role for political parties." *Colorado I*, Pet. App. 104a. FECA's legislative history does not reflect any concern by Congress that party spending might be corruptive.

The Factual Record

Most of the materials developed during the extensive discovery process, including depositions of numerous officials of both major parties, were placed into the summary judgment record. In this Court, however, the FEC largely abandons the evidentiary record that it compiled. Instead, the FEC Brief relies on speculation (*e.g.*, at 23, "It is reasonable to assume . . .") and citation to publications (*e.g.*, at 36, 38, 46, 48, and 49) that were not subjected to the rigors of

[5] Until *Colorado I* the FEC took the position that all expenditures by a party in connection with an election were coordinated. Thus, the Party Expenditure Provision was understood to regulate all party spending. *Colorado I* held that parties are capable of making independent expenditures, but it simultaneously held that FECA cannot restrict such expenditures.

[6] The Party Expenditure Provision limits were established in 1974. The limits on House races are $10,000 adjusted annually by the Consumer Price Index ("CPI"). § 441a(c)(1). Limits on party spending in Senate races and states with a single congressional district are based on the voting age population or $20,000 and are also adjusted annually for population and CPI. § 441a(d)(3)(A). The Senate limits are discussed further *supra* at 2 n.2. These limits "substitute" for the limits from which parties are "exempted" by § 441a(d)(1). *Colorado I* at 96a.

discovery and adjudication. The FEC fails to cite its own experts, perhaps because their testimony supports the position of the Colorado party. Pet. App. 83a (district court opinion, *citing* Sorauf/Krasno Report). The FEC Brief adds nothing material to what the Court knew at the time of *Colorado I*.

The Colorado Party deposed two of the FEC's affiants, both former United States Senators. These Senators testified that they had never been subjected to corruption or untoward influence by the party with which they chose to associate.[7] The Party also introduced into evidence the expert reports by Professors Anthony Corrado and Herbert E. Alexander which are reproduced at JA 106-157 and 170-243. The FEC deposed the authors of those reports at length. It has never asserted that these depositions undermined the reports.

Once discovery was concluded, the Colorado Party moved for summary judgment accompanied by a comprehensive statement of undisputed facts to which the FEC was obliged to respond with specificity, identifying any basis for disagreement. The FEC's response appears at JA 26-89. The Colorado Party's submissions, and the FEC's responses were relied upon by the courts below, and offer detailed insight into the unique relationship between political parties and their candidates.

The district court opinion reviews the record in detail and sets out the undisputed facts (Pet. App. 54a-91a). The FEC

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[7] When asked if party support had corrupted him, Senator Paul Simon replied, "I have never promised anyone anything." (JA 282). Similarly, Senator Tim Wirth had no example of ever having been corrupted. Neither Senator identified any other member of Congress who had been corrupted by his or her party. Similarly, none of the *Amici* members of the House and Senate assert that they have been corrupted by their respective political parties, let alone that they were corrupted by coordinated party expenditures. This lack of corruption is noteworthy since each of the Amici Senators benefitted from party coordinated expenditures. *See infra* at 12 n.10.

Brief makes no attempt to take issue with the district court's careful factual analysis or to grapple with the evidentiary record that the FEC insisted be compiled. Summarized below are some of the key undisputed facts.

The Unique Relationship Between Political Parties And Their Candidates

Political parties are voluntary associations formed to support candidates and promote policies. (JA 31-33, at ¶¶ 5-6). Parties are unique in their close relationship with and dependence on their candidates. (JA 32-33, 48, at ¶¶ 8, 28). Parties recruit and promote their candidates, work with their candidates to define party messages for the voters, and through their candidates seek to win elections in order to govern. (JA 34-39, at ¶¶ 11-12, 14, 16). Voters know parties by their candidates, and know candidates by their party affiliations. (JA 32-36, 58-59, at ¶¶ 8, 12, 44-45). Without their candidates, parties would be just another political interest group. (JA 54-55, 58-61, at ¶¶ 38, 44-45, 48).

The unique role of the modern political party in our democracy is widely recognized. (JA 30-36, at ¶¶ 4-13). Election laws accommodate party needs for primaries or other devices to nominate the party candidates. (JA 33-35, at ¶¶ 9-11). Typically name and party affiliation are the only ways a candidate is identified on the ballot. (JA 59, ¶ 45). Consistent with all of this, FECA identifies political parties by their unique role in nominating candidates who appear on the ballot as the candidate of the nominating group. § 431(16). Moreover, subpart (1) of the Party Expenditure Provision confirms the unique character of parties, exempting their expenditures from FECA's general limits. *Colorado I*, Pet. App. 96a.

The relationship between a political party and its candidates is so close that, until *Colorado I*, the FEC viewed parties as incapable of engaging in campaign speech

independent from their candidates. (JA 48-49, at ¶ 29). Forcing a party to engage in campaign speech independent of its candidate is an "unnatural act." (JA 48-52, at ¶¶ 28-32). The FEC's own experts acknowledged this "unique" relationship and the strain caused by separating party from candidate. (JA 50-51, at ¶ 31).

Following *Colorado I*, some political parties attempted the separation necessary to permit independent expenditures. (JA 51-52, at ¶ 32). They found that such an effort entails duplication, inefficiency, and expense. *Id.* Moreover, the resulting inability to coordinate the party's message with that of its candidate impairs effective communication and results in public confusion. (JA 55-56, at ¶ 39). The FEC's own experts concede that coordinated speech is far more effective and attractive to parties than independent speech. (C.A. App. 511-13). They also concede that political parties would engage in much more coordinated speech if they were not inhibited by FECA. (C.A. App. 511).

The Operation Of Political Parties

Political parties establish national and state level committees to act for the parties with respect to federal campaigns. § 431(14), (15). The Republican and Democratic national parties each have national, senatorial, and congressional campaign committees. Pet. App. 59a n.19. Similarly, the Republican and Democratic parties in each state maintain federal campaign committees. (JA 32-33, ¶ 8). These party committees are distinct from the campaign committees of the individual candidates, though cooperation is common. (JA 48, ¶ 28). Plaintiff/respondent here is the federal campaign committee of the Colorado State Republican Party. (JA 29-30, ¶ 3).

In contrast to days past, modern political parties operate in a fish bowl. To comply with FECA, the federal committees of political parties typically maintain segregated federal (*i.e.*, "hard money") accounts. 11 C.F.R. § 102.5. The restrictions

imposed on the receipt and use of hard money are detailed below at 14-17.

Political party committees also maintain state accounts subject to state regulation. For instance, in Colorado no person can contribute more than $25,000 to the Colorado Republican Party per year. Colo. Rev. Stat. § 1-45-105.3(2)(a). Thus, unlimited "soft money" contributions are not permitted in Colorado. Colorado also requires disclosure of all contributions, and the party's reports are available online at <www.sos.state.co.us/pubs/election/main.htm>.[8]

Party disclosures are closely scrutinized by opposing parties and candidates, public interest groups, and the media. Political parties are accountable to the public. The hint of scandal has immediate adverse repercussions, both for contributions and at the ballot box. *See* (JA 39-40, 61, at ¶¶ 17, 48).

Political parties engage in political speech. State and national committees of a party work together to assist party candidates and to communicate the party message to voters. "Party committees offer candidates a wide range of election-related services, including organizational consulting, issue research, polling, mail services, and media production and advertising assistance." (JA 207). Some national committees "have state-of-the-art television and radio production facilities on their premises, which are used to give candidates technical

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[8] The Brief of State Attorneys General *Amicus Curiae* notes that political parties are subjected to a variety of regulations under state law. *See* Brief *Amicus Curiae* of the States of Missouri, Colorado, Hawaii, Montana, New York, Oklahoma and Vermont In Support of Petitioner at 2 n.1. The constitutionality of these restrictions is not at issue here. According to the Attorneys General, at one time 20 states limited party support of candidates but today only 17 do so, with 33 now imposing no such limit. Thus, the trend is to eliminate such limits, and the substantial majority position among states disfavors such limits.

and editorial assistance in producing television and radio ads." (JA 209). With respect to coordinated party expenditures, *"[o]ver 90 percent of the monies spent by national party committees on behalf of their candidates is spent on political communication."* (JA 210-11) (emphasis added).[9] All coordinated campaign speech paid for by a party is required to disclose the party's sponsorship both by FECA, § 441d, and by federal communications law, 47 U.S.C. § 317.

Party committees may make only limited cash contributions directly to a candidate or campaign. A state party such as the Colorado Republican Party may contribute only $5,000 per candidate per election. § 441a(a)(2). Certain national party committees, in combination, may also contribute up to $17,500 to any candidate for the United States Senate per six-year election cycle. § 441a(h). Expenditures made and controlled by a party committee, however, are *not* subject to these contribution limits. As the FEC repeatedly reemphasizes, *"coordinated party expenditures . . . are not contributions."* *See, e.g.*, 62 Fed. Reg. 50,708, 50,712 (1997); FEC Press Release of March 1, 2000 at <www.fec.gov>. As the FEC complaint in this case illustrates, the FEC treats excessive coordinated expenditures as violative of the Party Expenditure Provision, not of the contribution limit of § 441a(a)(2).

The FEC's experts explain that political parties generally do not allocate support to candidates in return for policy positions; instead, their objective is "to win or maintain control of the chamber and the powers of the majority

[9] The FEC's Reply Brief for Petitioner concerning certiorari stated (at 4-5 n.5) that the FEC was "unaware of any record material(s) that would support the 90% figure." The 90% figure appears in the expert report of Professor Anthony Corrado (JA 210), and was *admitted* by the FEC in the district court (JA 57, ¶ 42).

legislative party." (C.A. App. 483). Thus, parties allocate their support "for electoral reasons—a chance to win a seat, the danger of losing a seat," rather than to coerce particular decisions. (C.A. App. 485). Several of the *Amici* political scientists confirm this. *See infra* at 27 n.17. Discovery did not identify any instance in which a political party changed a candidate's vote by offering or withholding campaign support.

"One of the major problems in the campaign finance system is the inability of challengers [as opposed to incumbent candidates] to raise the monies needed to wage viable campaigns." (JA 204). "Party money is the only major source of funds in the political system that challengers can rely on to help counter the overwhelming resource advantage incumbents enjoy as a result of their greater success in fundraising [and] the privileges that accompany their position in government, such as the franking privilege." (JA 205). The statements of the FEC and Colorado Party experts are confirmed by the following statistics, which the FEC admitted (JA 76-77):

> In both parties in 1996, the majority of party coordinated expenditures were made on behalf of non-incumbents. The Democrats devoted 85 percent of their total coordinated expenditures in Senate races to challengers (31 percent) and open seat candidates (54 percent). In House races, 80 percent was spent on behalf of non-incumbents, with challengers (56 percent) receiving more than twice the share that went to open seat candidates (24 percent). . . .
>
> The Republicans' coordinated activity also favored non-incumbents. Even with [an] unusually large number of threatened incumbents, the Senate and House committees each disbursed close to two-thirds of their coordinated funds on races involving non-incumbents.

(JA 201-202).[10] Party support of challengers in the 2000 election will equal or exceed the figures for the 1996 election according to preliminary figures that can be found in the FEC's own Press Release of November 2, 2000 at <www.fec.gov>. In short, political parties are "essential to the vitality of American democracy," (JA 173), as they make political races more competitive and meaningful by identifying and assisting non-incumbent candidates. (JA 75-81, at ¶¶ 74-80).

Since 1974, the Consumer Price Index ("CPI") has increased by over 328%, so that $10 in 1974 is equivalent to about $33 today.[11] However, the cost of campaigning has increased much more than the CPI. For instance, while the

[10] The history of party coordinated spending for *Amici* Senators confirms that parties tend to support non-incumbents and those incumbents who need party assistance.

For example, in his 1998 campaign, Senator John McCain received no party coordinated expenditures. He raised over $4 million and was reelected with 68% of the vote (Senator McCain had almost $2 million left over which he transferred to his 2000 campaign for the Republican presidential nomination). In 1992, however, following the so-called Keating Five scandal, Senator McCain had a more challenging race, raised only $3.3 million and was the beneficiary of $302,528 in party coordinated spending, which equaled almost 10% of his funding. Similarly, Senators Max Cleland and Russell Feingold in their first campaigns as challengers against incumbent Senators in 1996 and 1992 received party coordinated support which equaled 22.3% and 19.1% of their total campaign receipts or $638,939 and $353,210, respectively. In 1998, coordinated expenditures declined to 2.9% of Senator Feingold's funding. Freshman Senator Charles Schumer who also beat an incumbent in 1998, has the distinction among *Amici* of receiving the highest amount of party support ($2.5 million) from three political parties (Democratic, Liberal, and Independence Parties), which accounted for over 15% of his funding. Data for all *Amici* Senators is contained in Addendum A to this Brief.

[11] *See supra* at 2 n.2, showing the FEC's inflation calculation that $20,000 in 1974 dollars equal $67,560 in year 2000 dollars.

CPI rose about 40 percent between 1976 and 1980, the cost of "such basic items as mass media, television commercials, and air travel, grew by 50, 100, and 300 percent." (JA 194). These campaign costs have continued to escalate much faster than the rate of inflation. *Id.*

FECA's limits on coordinated party expenditures prevented parties during 1996 from employing "significant amount of media broadcast time" to engage in effective communication:

> Generally the § 441a(d) limits prevent the parties from purchasing the broadcast time needed to air more than one or two ads effectively on a statewide basis. For example, in 1996, the national party organizations were permitted to spend $168,707 in South Carolina under the § 441a(d) ceiling. The estimated cost to air *one* thirty-second campaign ad in South Carolina on a statewide basis with enough frequency that it would penetrate the viewing audience and have its message understood by voters was approximately $186,000.

(JA 214.) The comparable 1996 costs in Colorado for one 30-second ad for a Senate candidate was "$123,750 against a limit of $170,932." *Id.* In short, party spending limits "make it impossible for [party] committees to pay for a very extensive or intensive amount of campaign speech." *Id.* Indeed, "[a]t this level of funding, party committees could not afford to pay the postage on one letter to each eligible voter in a district or state, never mind the cost of the stationary and printing needed to produce the letter." (JA 193).

The Sources Of Party Committee Funding: Hard Money And Soft Money

Hard Money

Party committees obtain their funding exclusively from voluntary contributions (JA 39-40, at ¶ 17) and transfers of excess hard money funds from their own federal candidates. Hard money—the only money that parties can spend in

connection with federal elections—may come only from individuals or political action committees ("PACs"), or from federal candidate committees. § 441a(a) and § 439a. Contributions from corporations or unions are prohibited. § 441b. For both Republican and Democratic party committees, the majority of hard money comes in increments of less than $100. (JA 44-45, at ¶¶ 23-24), Pet. App. 63A-64a (district court opinion).[12] As the FEC *admitted* below, "hard money contributions overwhelmingly result from direct mail solicitations." (JA 45, at ¶ 24).

Limits On Individuals

- Individuals may contribute only $5,000 to a political party per calendar year for use in connection with the party's federal activities, including the making of coordinated expenditures. § 441a(a)(1)(C).
- Individuals may contribute only $1,000 per election to a candidate for federal office. § 441a(a)(1)(A).
- Individuals may contribute up to $20,000 per calendar year to a national political party committee. § 441a(a)(1)(B).
- Individuals also are subject to a $25,000 per calendar year limit on contributions to the federal accounts of *all* candidates and political committees, including PACs. § 441a(a)(3). If the full $25,000 is contributed to committees, then nothing may be given to individual campaigns, and vice versa. § 441a(a)(3).

[12] The Brief of *Amicus Curiae* National Voting Rights Institute (at 2-3) suggests, without confirmable citation, that the average hard money contributions in the 2000 election cycle was over $200. This figure encompasses contributions to candidates, including presidential candidates, who raised record amounts of $1,000 contributions this election. It is not the average for hard money contributions to political parties. The record shows that the majority of hard money contributions to political parties are under $100.

- Once a contributor reaches a limit, FECA forbids the contributor from "earmarking" any additional contributions to a candidate through any other source, including a political party. § 441a(a)(8). Contributions to a party that "are in any way earmarked or otherwise directed" to a candidate or campaign must be reported by the party and count against the individual's $1,000 limit. § 441a(a)(8).

Limits On Corporations And Labor Unions

- Corporations and labor unions are prohibited from making *any* contributions in connection with any federal election. § 441b. They may establish PACs for their personnel but may not themselves contribute to the PACs. § 441b(b)(2)(C).

Limits On PACs

- Like individuals, political action committees, which must register with the FEC pursuant to § 433, may contribute no more than $5,000 per calendar year to a party committee. § 441a(a)(2)(C).
- Multicandidate political action committees ("PACs") may contribute $5,000 per candidate per election. § 441a(a)(2)(A). Otherwise, political action committees are also subject to the $1,000 per candidate per election limit found in § 441a(a)(1)(A).
- PACs may contribute $15,000 to the national political party committees. § 441a(a)(2)(B).
- PACs are also subject to the restrictions on earmarking found in § 441a(a)(8).
- All individual and PAC contributions discussed above must be fully reported by the recipient committees pursuant to § 434.

Transfers From Candidates

- Federal candidate committees are permitted to transfer unlimited amounts of their own excess hard money funds to political party committees. § 439a.

• In the 2000 election cycle, Democratic *candidates* donated $7.7 million to the Democratic party committees, more than these party committees spent on coordinated expenditures. *See* Jonathan D. Salant, *More House Races Exceed $1 Million To Run Campaigns*, The Detroit News, Dec. 27, 2000, at 13, *available at* 2000 WL 30260249. In addition, Republican *candidates* donated $18 million in excess campaign funds *to* the national party committees. Again, more than the amount spent on coordinated expenditures. *Id.* These candidate donations are in addition to the type of candidate fundraising for parties discussed in the FEC Brief (at 31-32 n.14).

Enforcement and Sanctions

• A knowing and willful violation of FECA involving over $2,000 is a crime punishable by up to one year's imprisonment and a fine of up to $25,000 or 300 percent of any involved contribution or expenditure. § 437g(d).

• In a civil enforcement action, the court may impose an injunction and a civil penalty equal to the greater of any contribution or expenditure involved or $5,000. § 437g(a)(6)(B). If the violation is knowing and willful, the potential civil penalties double. § 437g(a)(6)(C).

Soft Money

Present FEC regulations allow national party committees to receive soft money contributions in unlimited amounts from any source, including corporations and unions. *See* 11 C.F.R. Parts 102, 103, and 106.[13] States, including Colorado, restrict

[13] The most recent FEC statistics show that 53% of all national Democratic Party receipts, and 42% of Republican receipts, is soft money. FEC Press Release, November 3, 2000. Moreover, the FEC data reflects that soft money revenues are increasing at triple digit rates (247% from 1992-96 and 100% from 1996-2000) while hard money revenues from 1996 to 2000 are almost flat. *See* Anthony Corrado, *Introduction to*

soft money receipts and use. *See, e.g.*, Colo. Rev. Stat. § 1-45-105.3(2)(a); Conn. Gen. Stat. § 9-333s(b), t(b). *Soft money cannot be spent in connection with federal elections or for coordinated expenditures*, Pet. App. at 23, but is instead used to assist candidates running for state office, *see* § 431(8)(A)(i) (limiting FECA to contributions in connection with a federal election), for voter registration and "get out the vote" drives, *see* § 431(8)(B)(xii), or for "issue ads." 11 C.F.R. § 106.5(a)(2)(iv).[14]

The FEC is conducting a rulemaking to determine whether soft money should be curtailed or eliminated. 63 Fed. Reg. 37,722 (1998). Nothing in FECA affirmatively authorizes parties to receive soft money. The FEC's general counsel has advised the agency that it has the power to eliminate soft money if it so chooses. *Id.* Also, bills were introduced in the last Congress to "ban" soft money.[15]

The Effectiveness Of Current FECA Limits

The record is entirely barren of evidence that FECA's limits on contributions are ineffective or readily are subject to circumvention. There is no showing that contributions are not accurately reported or that excessive contributions are not detected and remedied. Declarations obtained by the FEC

Chapter 6: Party Soft Money in Campaign Finance Reform: A Sourcebook, 165, 167-177 (Anthony Corrado, et al., eds. 1997); FEC Press Release dated June 23, 2000 *available at* <www.fec.gov>.

[14] The plurality in *Colorado I* noted that soft money may be used for certain party building activities but, in general, "may not be used to influence a federal election." Pet. App. 102a. More precisely, soft money may not be used to finance coordinated activity or for purposes of "express advocacy," which means speech that uses explicit language to advocate electoral action (e.g., "vote for" or "defeat"). *Buckley*, 424 U.S. at 44 & n.52.

[15] *E.g.*, S. 1593 (McCain-Feingold); H.R. 417 (Shays-Meehan) (passed by the House on September 14, 1999); H.R. 399, H.R. 715, S. 26, S. 982).

and excerpted in its Brief (at 31-32 n.14) reveal that parties are scrupulous in obeying FECA's earmarking constraints.

Public Perception Of Campaign Finance

The FEC offered evidence that some members of the public are cynical about the election process and the role of money. In particular, FEC expert Clyde Wilcox asserted that there is a public concern about "large" contributions, giving examples of which all involved soft money.

Prof. Wilcox conceded that the general public has little understanding of FECA's requirements and restrictions, such as the restricted sources and amounts in which hard money is raised, or the fact that only hard money can be spent in connection with a federal election. (C.A. App. 529-30). Nor does the public draw any distinction between independent and coordinated party spending. *Id.*

The FEC offered no evidence that, if all independent party spending instead were coordinated, the public would either understand or care about the difference. Nor did the FEC address the possibility of educating the public as to the true role of parties in the political process. *See* Pet. App. at 89a (district court opinion).

Claimed Corruption

The FEC offered no evidence that any modern political party has corrupted any member of Congress.[16] It asserted below (FEC C.A. Br. at 51-52) four claimed instances in

[16] The FEC introduced a declaration from Senator Simon that "big donors have a "leg up" in the legislative process. (JA 270). Presumably, this was a reference to soft money donors; it certainly did not identify the party as the corrupting entity. *See* Pet. App. 16a (court of appeals opinion). Senator Simon otherwise was unable to support corruption charges. (JA 282-85). The FEC offered documents, intended to show that large soft money donors may obtain increased access to, and opportunities to persuade members of Congress. Pet. App. 85a (district court opinion.) The FEC Brief did not press this line of argument.

which a party or its leaders threatened to withhold party support to affect candidate behavior. (C.A. App. Under Seal 91-94, at ¶¶ 234, 238, 239, 240). However, in none of the instances was the party request corrupt, and in none did the candidate accede to the request. The FEC Brief largely abandons before this Court any claim of actual corruption.

SUMMARY OF ARGUMENT

Under FECA's Party Expenditure Provision, a political party is forbidden to spend more than 7 cents per voter on speech that the party coordinates with its candidate for Congress—far less than the cost of a single letter to each voter. Over 90% of the spending that is limited by the Party Expenditure Provision finances political communication. If a party wishes to engage in more speech in connection with the election, it must do so independently of its candidate. Moreover, to avoid controversy and enforcement proceedings, the separation of the party from its candidate must be clear and obvious. This Court repeatedly has held that limits on the money that may be spent on speech are limits on speech itself; that is the law of this case as established in *Colorado I*, and the FEC Brief does not challenge this settled principle.

Because a political party naturally has close and strong ties to its candidate, creating the conditions that permit unrestricted independent speech is exceptionally burdensome. Moreover, because the public perceives party speech as that of the candidate, and vice versa, differences between candidate and independent party speech create voter confusion and inhibit effective communication. The FEC does not dispute that independent party speech is much inferior to coordinated speech.

A party and its candidate are uniquely and strongly bound to one another because:

- A party recruits and nominates its candidate and is his or her first and natural source of support and guidance.

- A candidate is identified by party affiliation throughout the election, on the ballot, while in office, and in the history books.
- A successful candidate becomes a party leader, and the party continues to rely on the candidate during subsequent campaigns.
- A party's public image largely is defined by what its candidates say and do.
- A party's candidate is held accountable by voters for what his or her party says and does.
- A party succeeds or fails depending on whether its candidates succeed or fail.

No other political actor shares comparable ties with a candidate. FECA recognizes the uniqueness of the party/candidate relationship by (i) defining a "political party" as an entity that "nominates a candidate" who then "appears on the election ballot as the candidate of such [entity]," § 431(16), and (ii) providing that a party's spending in support of its candidates is not subject to FECA's general limits but must be addressed separately. Indeed, until *Colorado I*, the FEC conclusively presumed that all party spending in connection with a federal election was coordinated with the party's candidate, a presumption it applied to no other entity.

For these reasons, requiring a party to sever its candidate ties as the price for engaging in unrestricted political speech uniquely, directly, and substantially burdens the party's First Amendment rights of speech and association. This Court's precedents establish that any provision that directly and substantially burdens political speech triggers strict scrutiny. Accordingly, FECA's limits on coordinated party speech must fall unless the FEC shows that they are necessary and narrowly tailored to serve a compelling governmental interest in the least restrictive way, a showing the FEC Brief does not even claim to make.

Rather than attempting to satisfy strict scrutiny, the FEC mistakenly argues that FECA classifies all coordinated spending as a "contribution" and that limits on contributions are subject to a lesser standard defined in *Buckley v. Valeo*, 424 U.S. 1 (1976) and *Nixon v. Shrink Missouri Government PAC* ("*Shrink Mo.*"), 120 S. Ct. 897 (2000). Actually, the Party Expenditure Provision refers to its limits on coordinated party spending as "expenditure" limits, not contribution limits. But more fundamentally, both *Buckley* and *Shrink Mo.* set the standard of review based on an evaluation of the First Amendment effects of the particular limits at issue.

The contribution limits at issue in *Buckley* and *Shrink Mo.* applied to individuals or PACs, which typically do not have a political party's strong natural ties to a candidate. *Buckley* and *Shrink Mo.* found that, for individuals and PACs, coordination with a candidate was just one of many freely available avenues of political expression, and that individuals and PACs thus experienced only "marginal" and "limited" First Amendment burden from the limits at issue. 424 U.S. at 20-21; 120 S. Ct. at 903. That finding—not a "contribution" label—was the predicate for a lesser standard of review.

By contrast, party/candidate coordination is not just one of many equally available options for a party. Instead, a party's natural state is to be closely tied to its candidate, and these natural ties are exceedingly burdensome and difficult for a party to sever.

Limits on party coordination are best compared to limits that the original FECA imposed on a candidate's use of personal resources in coordination with his or her own campaign committee. Although the *Buckley* Court of Appeals found those limits comparable to contribution limits and sustained them, this Court applied strict scrutiny and struck them down. 424 U.S. at 53. *Buckley* did this even though a candidate's wealth may stem from narrow economic interests,

while a party's hard money comes entirely from a broad base of voluntary donations.

Because limits on party coordination directly and substantially burden party speech, the rationale of *Buckley* and *Shrink Mo.* calls for traditional strict scrutiny here. But even if the lesser standard described in *Shrink Mo.* applies here, the FEC still would have to show that FECA's limits on coordinated party spending are "closely drawn" to serve a "sufficiently important interest," 120 S. Ct. at 899. The Court of Appeals correctly held that the FEC did not meet either aspect of that lesser standard.

Throughout most of this litigation, the FEC asserted that FECA's limits on coordinated party speech prevent actual or perceived corruption. Yet, despite years of discovery – four years before *Colorado I* and a year and a half on remand – the FEC anticorruption rationale is without support. Tacitly conceding this, the FEC Brief asserts (at 23) that Congress could "*assume*" that limiting coordinated party spending prevents corruption.

In fact, Congress made no such assumption—much less a legislative finding—and it did not view parties as corruptive. Congress had a positive view of parties; it limited coordinated party spending as part of an effort to reduce overall campaign spending levels. *Colorado I*, Pet. App. 108a. The isolated fragments of a 1973 floor debate cited by the FEC Brief concern an unenacted bill and hinge on features that are not present in FECA.

Nor is the FEC's proposed assumption plausible. To begin with *FECA requires a party to use hard money for coordinated spending*. Hard money is raised in limited amounts from individuals and PACs and is fully reported and publicly disclosed. Scholars agree that a party's hard money is the cleanest available to candidates. Present law also permits parties to receive soft money in unlimited amounts

from corporations, unions, and other sources. *But soft money cannot be used for coordinated spending*. Any concerns over large contributions can be addressed directly, *Colorado I*, Pet. App. at 102a, as the FEC presently is considering in a pending soft money rulemaking. 63 Fed. Reg. 37,722 (1998), and Congress in proposed legislation.

Moreover, a political party's overriding objective is to elect its candidates and attain majority status so it can govern. While a party also has a platform and shared policy objectives, parties focus their campaign support on races that are in doubt, and on non-incumbent candidates who lack the independent sources of funding that incumbents soon develop. The FEC offered largely hearsay reports of four alleged instances in which an attempt was made to use party campaign support to affect candidate conduct: no attempt succeeded, and none involved a corrupt goal.

The scenario of candidate office-holder as party victim is untenable. A party's members of Congress form a strong party leadership group. Because they have independent financial support, they usually do not need or receive party coordinated spending. Indeed, they are net party contributors, and are most unlikely to be pushed around by their party, or by individual party leaders.

As post-remand discovery failed to support an anti-corruption justification, the FEC shifted to a theory that limiting party coordination prevents circumvention of FECA's limits on individuals and PACs. There is no indication that Congress adopted the party limits for that reason, however, and FECA otherwise effectively prevents circumvention.

FECA backs up limits on individual and PAC contributions to particular candidates with limits on their contributions to parties and with aggregate annual limits. It establishes comprehensive reporting and disclosure requirements,

assuring that a vigilant press (and vigilant opponents) may police conduct. FECA also forbids using "earmarked" contributions to intermediaries to circumvent limits, and it provides stringent penalties, including criminal penalties, for violations, which are further reinforced by the political consequences of violations.

These provisions are effective. Despite five and a half years of discovery, the FEC has no evidence that circumvention is a problem that might justify restricting coordinated party speech as a cure. The most the FEC offers is a lengthy footnote (at 31-32 n.14) discussing the "tally system" of the Democratic Senatorial Campaign Committee ("DSCC") that encourages party candidates, particularly incumbents, to solicit contributions to the party and keeps track of how much each candidate raises.

However, the FEC itself concluded that a tally system complies with FECA. Moreover, the very declarations cited by the FEC consistently emphasize that (i) tallied funds are not earmarked for the credited candidate but rather are allocated to win close races, and (ii) the one committee using a tally system has been scrupulous to comply with FECA. If problem still exists, it could be solved directly by clarifying the law.

In sum, FECA's limits on coordinated party spending serve no interest that might justify their burden on party speech. Nor are the limits closely drawn to the speculative interests the FEC proposes. Rather, FECA's limits on coordinated party spending are an anachronistic holdover from a pre-*Buckley* attempt to reduce the overall level of campaign speech, an attempt *Buckley* rejected. They needlessly interfere with party speech and other important party functions, including support of non-incumbent candidates. They diminish the value of hard money vis-à-vis soft money. They violate the First Amendment and should be struck down.

ARGUMENT

I. The Party Expenditure Provision Limits Impose A Unique, Direct, and Substantial Burden On The Party's Right Of Free Speech, And A Heavy Burden Of Justification On The FEC

There is no dispute that the Party Expenditure Provision limits party speech. "Over 90% of the monies spent by national party committees on behalf of their candidates is spent on political communication." (JA 57 at ¶ 42, 210-11). And the FEC experts admit that parties would engage in far more coordinated spending if they could (C.A App. 513). *Buckley* was clear that restricting money available for speech restricts speech itself. 424 U.S. 18. *Colorado I* adopted that principle as the law of this case in its ruling that restrictions on independent party expenditures are unconstitutional. Pet. App. 104a. FEC does not seek reconsideration of this holding.

For political parties, which naturally have close ties to their candidates, coordinated speech is not just one of many freely available avenues of expression. Instead, to avoid coordination with candidates, parties must incur significant costs and accept serious inefficiencies. This direct and substantial burden on coordinated party speech imposes on the FEC a correspondingly heavy burden of justification.

A. Parties' Strong Natural Ties To Their Candidates Make Restrictions On Coordinated Speech Uniquely And Substantially Burdensome

Buckley found that limiting coordinated spending and contributions by an individual or PAC "entails only a marginal restriction upon the contributor's ability to engage in free communication," and only a "limited effect" upon associational rights. 424 U.S. at 21, 28. It stressed that individuals and PACs have many means to express their

views and have no particular need to involve the candidate to do so. *Id.* at 20-21. In particular, nothing hinders individuals and PACs from engaging in unlimited independent speech. *Id.* To speak independently, they do not have to disentangle themselves from a candidate, but merely avoid a relationship that involves coordination. Thus, an individual or PAC experiences "little direct restraint on . . . political communication" from the limits on coordinated spending because the contributor could freely "expend such funds on direct political expression" without involving the candidate. *Id.* at 21-22.

The situation of a political party is very different, as FECA itself recognizes. Section 431(16) defines a "political party" precisely in terms of its unique candidate relationship: a political party is an entity that "nominates a candidate for election . . . whose name appears on the election ballot as the candidate of such [entity]." Moreover, the Party Expenditure Provision starts by "exempting political parties from the general contribution and expenditure limitations." *Colorado I*, Pet. App. 96a. Since FECA itself recognizes that the party/candidate relationship is unique, it would be surprising if *Buckley*'s discussion of individual and PAC support of candidates translated freely into the Party context. It does not.

For a political party, entering into a working relationship with a candidate is not just one of a range of equally available options. To the contrary, party candidates exist because parties nominate them, and from the moment a party makes a nomination a natural, strong, and unique tie is established. Indeed, because many candidates are incumbents who also serve as party leaders, the party/candidate relationship typically predates a particular nomination.

The candidate relationship, moreover, is vital to the historic purpose of political parties. Parties exist precisely to elect candidates that share the goals of their party. They seek to

build majorities that will permit the party to govern. Parties succeed only if their candidates succeed.[17]

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[17] The academics who joined in the Brief of Paul Allen Beck, *et al.* as *Amici Curiae* in Support of Petitioner, recognize the unique and statutory role of parties. "Democracy is unthinkable without parties." Paul Allen Beck & Marjorie Randon Hershey, Party Politics in America 330 (9th ed. 2001). "Most political scientists who study American politics believe that the U.S. political system is a pluralistic democracy with a few majoritarian institutions (namely, elections and political parties)." Anthony Gierzynski, Money Rules: Financing Elections in America 11-12 (2000). Accordingly, the parties are given a "unique legal status" in the government. Leon D. Epstein, Political Parties in the American Mold 156 (1986). As a result, scholars advocate expanded roles for these unique parties. "Give parties freedom to allocate the hard resources that they are able to raise among their candidates for office as they choose and not subject to existing restrictions, in order to provide a robust role for political parties . . . ." Norman J. Ornstein, Thomas E. Mann, *et. al*, *Reforming Campaign Finance* (1997), *in* Campaign Finance Reform: A Sourcebook 380 (Anthony Corrado, Thomas E. Mann *et. al* eds., 1997); "Expand the existing limits on individual contributions to parties." *Id.*

The parties are unique to these scholars because of the way they bring people together. "[P]arty committees . . . are umbrella organizations that represent a broad range of interests." Paul S. Herrnson, Congressional Elections 271 (3rd ed. 2000). *See also* Larry J. Sabato, The Party's Just Begun 5 (1988) (book cited in Daniel M. Shea, Transforming Democracy 165 (1995)) ("The parties are often accused of dividing us; on the contrary, they assist in uniting us as few other institutions do."). "Party appeals must be broad and inclusive; the party cannot afford to be exclusive or to represent only a narrow range of concerns." Beck & Hershey, *supra*, at 15.

> Political parties, with all their well-known human and structural shortcomings, are the only devices thus far invented by the wit of Western man which with some effectiveness can generate countervailing collective power on behalf of the many individuals powerless against the relatively few who are individually—or organizationally—powerful.

Walter Dean Burnham, Critical Elections and the Mainsprings of American Politics 133 (1970) (quoted in Beck & Hershey, *supra*, at 330.) "In the process the parties promote political equality in elections through

the representation of those interests and by encouraging participation." Gierzynski, *supra*, at 76. "[T]he two great national parties bring a unifying, centripetal force. . . . Their similar symbols and traditions . . . are a force for unity in governmental institutions marked by decentralization and division." Frank Sorauf, Party Politics in America 15 (5th ed. 1984).

Furthermore, many of the *Amici* political scientists acknowledge that the parties, and their committees, do not force unwanted views or positions upon their candidates. "[Party leaders] believe a party should bolster its candidates' campaigns, not replace them with a campaign of its own." Herrnson, *supra*, at 15. "The party leadership has so far refrained from giving out campaign money and services on the basis of a candidate's support for the party's program." Beck & Hershey, *supra*, at 89. "The central (perhaps sole) end for [legislative campaign committees] is to reelect caucus members and secure more seats." Shea, *supra*, at 63. "Although controlled by incumbent officeholders, [congressional campaign committees] have been able to resist the pressures to serve only the reelection interests of incumbents . . . ." Beck & Hershey, *supra*, at 82. "As several [campaign] participants told us, resource allocation was . . . driven by polling numbers in competitive races." David B. Magleby, *Conclusions and Implications*, *in* Outside Money 219 (David B. Magleby ed., 2000). Indeed, the parties spread out their money and make electoral contests more competitive. "In systems in which parties are strong, money should be distributed more broadly among candidates in competitive contests." Gierzynski, *supra*, at 25. "Parties, more than individuals and PACs, are the campaign finance participants most willing to invest in challengers, ..." Magleby, *supra*, at 211. "The national parties target most of their money to candidates in close races." Paul N. Herrnson, *The Revitalization of National Party Organizations*, *in* The Parties Respond 62 (L. Sandy Maisel ed., 2nd ed. 1994). "[Party] organizations are focused almost completely on winning elections in an electoral system in which they must appeal to majorities." Beck & Hershey, *supra*, at 53. "In addition to spending disproportionately on marginal, competitive races, the parties time their spending to assure its strategic value." Frank Sorauf, Money in American Elections 141 (1988).

Indeed, rather than forcing unwanted views upon their candidates, parties are unable to speak apart from their candidates. Mann and his co-authors, in their proposed campaign finance reforms, scoff at "the subterfuge," encouraged by the *Colorado I* decision, that parties "can operate independently of their own candidates." Ornstein, Mann *et. al*, *supra*, at 380.

In important respects, the ties between a party and its candidate are beyond the party's control. The public knows parties through their candidates and candidates through their parties.

> Even before a party candidate is chosen, the public will know a great deal about the candidate because of its knowledge about the party.

Anderson v. Celebrezze, 460 U.S. 780, 822 (1983) (Rehnquist, J. dissenting). Unavoidably, a candidate's speech and conduct will be attributed to his or her party, and vice versa. And this is desirable because it creates accountability.

Following *Colorado I*, political parties tried the type of independent speech that *Buckley* found to be a freely available option for individuals and PACs. The undisputed evidence is that parties found establishing and maintaining independence to be complex, expensive, and difficult.[18] Furthermore, the party's independent speech—which the public does not distinguish from coordinated speech (C.A. App. 529-30)—often created voter confusion and even undermined the candidate the party sought to support. (JA 54-56, at ¶ ¶ 36, 39).[19] Thus, independent party speech has proved to be inefficient as well as burdensome and expensive.

The FEC does not deny that political parties find independent speech to be much less effective than coordinated speech. (C.A. App. 511-512). To the contrary,

[18] In addition to expenses caused by duplication of effort and staff and the like, the district court observed that independent party broadcast advertising is not eligible for the "lowest rates," mandated by the Federal Communications Commission. Pet. App 83a.

[19] As the ads that led to this case exemplify, see *Colorado I* at Pet. App. 97a ("advertisements attacking Congressman Wirth"), because there is less need for coordination in attacking an opposing candidate than in presenting an affirmative case to the voters, independent campaign speech tends to be negative in nature.

the FEC's experts contended that coordinated speech is so much more attractive that, if FECA's limits were lifted, parties would raise a great deal of additional hard money just to engage in such speech. (C.A. App. 513). The FEC's premise that parties do not already raise as much money as they can is questionable, but the recognition that, for a political party, independent speech is much less effective than coordinated party speech certainly is true.

Buckley itself recognizes that candidate relationships differ. The original FECA limited the ability of a candidate to support the activities of his or her authorized campaign committee from personal resources. *Buckley* held that, whether viewed as an expenditure limit or a contribution limit, this provision substantially interfered with the candidate's First Amendment rights and was invalid. 424 U.S. at 52. The relationship between a candidate and his or her campaign committee much more closely approximates the party/candidate relationship than the relationship of a candidate with an individual or PAC donor. Moreover, unlike party funding, a candidate's wealth may spring from narrow economic interests while a party's hard money comes from broad-based and limited voluntary contributions. This difference between the sources of candidate wealth and party funding suggests there is less justification for restricting parties. Yet the FEC ignores this aspect of *Buckley*.

In striking down FECA's limits on a candidate's support of his or her own campaign committee, *Buckley* did not hold that candidates have a favored constitutional status. Instead, it held that the factual characteristics of regulated classes must be taken into account in determining if a provision substantially burdens the speech of a given class. Contrary to the FEC Brief (at 39), the Colorado Party here does not claim "favored constitutional status" for political parties. Instead, the Colorado Party simply argues that, given the factual characteristics of political parties, restraints on their

coordinated activity substantially burdens their speech, and does not merely impose a marginal and limited constraint.

The FEC argues that some of the Founders were suspicious of political parties. The Founders were far more suspicious of government regulation of political speech. Hence, the First Amendment and hence the government's heavy burden of justifying any substantial restraints on speech. The issue here is not whether parties have some "exemption" from a governmental right to regulate (FEC Brief at 15, 22), but whether the FEC has justified the burden imposed on party speech by the Party Expenditure Provision limits. It has not.

Requiring individuals and PACs to sit on the left of the campaign train while candidates sit on the right may not much interfere with their journey. But a party and its candidate are joined at the hip. Ordering a party and its candidate to sit on opposite sides of the aisle is a very great imposition indeed. In short, FECA's limits on coordinated spending by a political party uniquely, directly and substantially burden the party's First Amendment rights.

B. This Direct And Substantial Burden Triggers A High Standard Of Justification By The FEC

Buckley applies classic strict scrutiny to all direct and substantial burdens on political speech. 424 U.S. at 44-45. No decision of this Court supports a lesser standard where such a substantial burden is found. As shown above, the Party Expenditure Provision limits directly and substantially burdens party speech. Thus, the FEC must prove that the limits are narrowly tailored to compelling problems that otherwise cannot adequately be addressed. *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 265 (1986); *Reno v. ACLU*, 521 U.S. 844, 874-75 (1997).

The FEC Brief does not even claim to satisfy strict scrutiny. Instead, it argues (at 4) that coordinated party expenditures are classified by FECA as "contributions" and

that "restrictions on contributions require less compelling justification," *citing Nixon v. Shrink Missouri Government PAC*, 120 S. Ct. 897, 903-04 (2000).

This Court has been clear, however, that First Amendment analysis turns on actual effects on speech, not on labels. *Colorado I*, Pet. App. 108a. Thus, *Shrink Mo.* looked behind the "contribution" label, finding a close similarity in structure and effect between the contribution limits at issue there and those evaluated in *Buckley*. 120 S. Ct. at 903-04, *citing Buckley*, 424 U.S. at 20-21. That similarity in effect (*i.e.*, only a "marginal" effect on speech) was the critical predicate of the Court's adoption of a lower standard. The direct and substantial burdens imposed by the Party Expenditure Provision limits negate any such similarities here.

But to the extent that labels matter, the FEC's argument still fails. Although FECA classifies most coordinated activity as a contribution, the Party Expenditure Provision uses the term "expenditure" for political party coordinated activities. § 441a(d). Consistent with this statutory classification, the FEC itself recently stressed that "coordinated party expenditures . . . are not contributions." *See supra* at 10.

In this particular case, however, little turns on which standard is applied. *Shrink Mo.* holds that, to justify even a classic *Buckley*-type contribution limit, the government must show that the limit is "closely drawn" (even if not truly "fine-tuned") to serve "a sufficiently important interest." 120 S. Ct. at 899. As the Court of Appeals held, and as we show below, the FEC's attempted justification of the Party Expenditure Limit fails even under the *Shrink Mo.* standard.

II. The FEC Has Not Shown That The Party Expenditure Provision Limits Prevent Actual Or Perceived Corruption

A. The FEC Offers No Evidence That A Modern Political Party Ever Has Corrupted A Member of Congress

Despite five and one-half years of discovery, *the FEC failed to identify a single instance in which a modern political party has corrupted a member of Congress.* The FEC, below (FEC C.A. Br. at 51-52), proffered four instances in which a political party or its leaders reportedly tried to affect the behavior of a candidate by withholding support. (C.A. App. Under Seal 91-94, at ¶¶ 234, 238, 239, 240). In three of the examples, the party rejected the proposed withholding. In one case, the Democratic party withheld support in an unsuccessful effort to persuade a candidate to refrain from attacking an opponent's homosexuality. In no example did a candidate change a position as a result. More important, in no example was the party's purpose corrupt.

B. The FEC's "Assumption" That Coordinated Party Spending Causes Corruption is Unreasonable

Tacitly conceding its lack of evidence to support a corruption rationale, the FEC Brief asserts (at 23) that "[i]t is reasonable *to assume* that large coordinated expenditures by political parties . . . may be used to exert influence over legislators' behavior while in office" (emphasis added). The first problem with this assumption is that, if parties actually used campaign support to influence official behavior, five and one-half years of discovery surely would have revealed abundant evidence. In fact, as just discussed, the FEC's evidentiary cupboard is bare. This lack of evidence is not surprising. To the contrary, there are many good reasons why the FEC's proposed "assumption" is unreasonable.

First, a political party's prime and overwhelming motivation is to elect as many candidates as possible, looking toward a majority that will permit the party to govern. The evidence is clear and undisputed that parties direct their support to candidates that have a chance to win, not to candidates with pliable policy views.

Second, a party's incumbent members of Congress tend to be its leaders. They are unlikely to be pushed around by offers to provide or threats to withhold campaign support. This is particularly true since incumbent members of Congress quickly develop their own sources of funding and typically do not receive substantial coordinated party support. Incumbent officeholders donate *more* excess campaign funds *to* their parties than the parties spend on *all* party congressional candidates combined.[20] This simple fact destroys the FEC's

[20] During the 1999-2000 election cycle, the National Republican Congressional Committee ("NRCC") reported coordinated expenditures of $3.6 million; and the Democratic Congressional Campaign Committee ("DCCC") reported $2.6 million. *See* reports *available at* <www.fec.gov>. At the same time, many incumbents made substantial transfers of "excess funds" from their campaign committees. The NRCC raised $18 million from its members in the House and the DCCC raised $7.7 million from its incumbents. Jonathan D. Salant, *More House Races Exceed $1 Million To Run Campaigns*, The Detroit News, Dec. 27, 2000, at 13, *available at* 2000 WL 30260249. Filings with the FEC show, for example, that on Mar. 30, 2000, Rep. Dick Gephardt transferred $100,000 to the DCCC. Rep. David Bonior contributed $100,000 to the DCCC on July 25, 2000. Rep. Dick Armey transferred $100,000 on July 26, 2000 to the NRCC and an additional $100,000 on Sept. 13, 2000.

Sen. Trent Lott transferred $200,000 to the National Republican Senatorial Committee ("NRSC") on June 20, 2000. Contributions were not limited to the party's leadership. Rep. Nancy Pelosi contributed $85,000 to the DCCC on Oct. 2, 2000. Retiring Sen. Connie Mack transferred $1.1 million from his campaign account to the NRSC on June 29, 2000.

Amici also supported their party. For instance, Rep. Christopher Shays transferred $10,000 to the NRCC on Mar. 1, 1999, and Rep. Sherwood Boehlert made contributions to the NRCC of $15,000 on July 2, 1999, and $25,000 on Oct. 10, 2000. *See* reports of respective candidate committees filed with the FEC.

speculation that political parties use coordinated spending to control the votes of its members of Congress.

Third, and relatedly, non-incumbent challengers and open seat candidates are the primary beneficiaries of party campaign support. For example, in 1996, the Democrats spent 85% of their Senate coordinated expenditures and 80% of their House coordinated expenditures to support non-incumbents. (JA 76 at ¶ 75, 201-02). At the time such non-incumbents are seeking office, they are not in a position to provide official favors.

Fourth, FECA's extensive reporting and disclosure requirements, combined with a vigilant press and our democratic system of government strongly discourage corruption. Parties and candidates who are seen to be engaged in questionable behavior are swiftly punished, both in terms of contributions and votes.

Congress never assumed, much less made a legislative finding, that parties corrupt their candidates. *See infra* at 36-37. To the contrary, in adopting FECA, Congress had a positive view of parties. *Colorado I*, Pet. App. 104a. Nor does *Buckley* or any comparable source justify belief that modern parties corrupt members of Congress. To the extent the public has any relevant concern, it arises from large soft money contributions, as is discussed below.

"Assumptions" are not proof, but even if they were, the FEC's proposed assumption that party spending causes corruption is unreasonable.

C. The Public Perception Of Corruption Discussed By The FEC Traces To Large Contributions Of Soft Money, Not To Coordinated Expenditures Of Hard Money

In the lower courts the FEC strongly stressed public perception of corruption as the key justification for the Party Expenditure Provision limits. In this Court the FEC Brief includes only passing references to "perceived corruption," (at 25 n.9) or "apparent corruption" (at 23). The reason for this shift is simple: the present public concern over money and politics overwhelmingly results from large contributions of soft money. There is absolutely no evidence that the public is concerned about parties' use of hard money to support their candidates. The FEC's proffered concern over public perception is a red herring. *See* Pet App. 88a-89a (district court opinion); (JA 61-64).

D. Congress Never Found That Coordinated Party Spending Causes Actual Or Perceived Corruption

In another effort to excuse its lack of evidence, the FEC Brief argues (at 47-49) that this Court should defer to Congress' "legislative judgments" concerning "prevention of corruption." However, the FEC Brief *never identifies any evidence of the supposed congressional judgment concerning corruption.*[21] In fact, the Party Expenditure Provision reflects Congress' attempt to reduce the overall level of spending on federal campaigns, not any concern over corruption.[22]

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[21] Similarly, *Amici* members of Congress fail to identify any such evidence. The *Amici* political scientists concede (at 3, 21) that their real concern is with large soft money contributions and that they seek to preserve the present limits on coordinated hard money spending as a legislative bargaining chip.

[22] The expenditure formula belies an anticorruption motive. As noted above, at 2 n.2 & 12 n.10, parties in large states, *e.g.*, California, or New York, may spend millions of dollars in coordinated speech on behalf of Senate candidates, while the Colorado Party may spend only $202,072. Under the FEC's various theories, the risk of corruption increases with the amount of coordinated spending. Congress apparently saw no such risk.

This issue was fully ventilated in *Colorado I*. There the plurality said (at Pet. App. 104a):

> this Court's opinions suggest that Congress wrote the Party Expenditure Provision not so much because of a special concern about the potentially "corrupting" effect of party expenditures, but rather for the constitutionally insufficient purpose of restricting what it saw as wasteful and excessive campaign spending. . . In fact, rather than indicating a special fear of the corruptive influence of political parties, the legislative history demonstrates Congress' general desire to enhance what was seen as an important and legitimate role for political parties in American elections.

It would be perverse to excuse a lack of evidence of a corruptive threat by deferring to a congressional judgment that Congress never made.

The FEC Brief asserts (at 25 n.9), that since Congress reenacted FECA after *Buckley*, it must have concluded that the Party Expenditure Provision was justified as an anti-corruption measure. That assertion simply turns a blind eye to history. *Buckley* left the country with an impending election and no election law. Congress and the administration raced to pull together whatever *Buckley* had not invalidated into emergency legislation to govern the election. There was no reevaluation of provisions that *Buckley* had left standing.[23]

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[23] In presenting the administration's revised FECA to deal with the emergency situation created by *Buckley*, then Assistant Attorney General Antonin Scalia explained: "The whole purpose of our bill is to submerge those issues that are controversial and to do the minimum amount necessary to enable the 1976 elections to proceed." Office of Legal

Casting about for some predicate for congressional deference, the FEC Brief (at 28) offers for the first time in this Court a lengthy quotation from a 1973 floor statement of an individual senator concerning a bill that never was enacted. That senator was concerned that, by allowing individuals to contribute $100,000 to a party (equivalent to over $300,000 today), there might be some temptation to impropriety. Isolated floor remarks concerning an unenacted bill carry no weight. *See Garcia v. United States*, 469 U.S. 70, 78 (1984). But beyond that, the present FECA contribution limits of $5,000 and $20,000 combined with the anti-earmarking provisions clearly eliminate the temptation that concerned the senator.

Moreover, as Justice Thomas pointed out in his *Colorado I* opinion, there are institutional reasons here why this Court should play its traditional independent role in assessing First Amendment burdens. Pet. App. 135a & n.9. As has been discussed above (at 11-12), party support is particularly important to challengers, while FECA was enacted by incumbents. In this particular political area, the deference the FEC seeks would "amount to letting the fox stand watch over the henhouse." *Id.*

Finally, even if Congress made a "legislative judgment" that a spending limit prevents corruption, no deference should be accorded if the judgment is unsupported or insupportable. This Court did not defer to Congress when it struck down limits on candidate contributions (*Buckley*, 424 U.S. at 23-24), campaign spending limits (*id.* at 22), or independent expenditure limits on individuals (*id.* at 50), committees (*FEC v. National Conservative PAC*, 470 U.S. 480 (1985)), or political parties (*Colorado I*). It should not defer here.

Counsel Statement accompanying § 2911, Legislative History of FECA Amendments of 1976 at 142 (Feb. 18, 1976).

III. The FEC Has Not Shown That The Party Expenditure Provision Limits Prevent Circumvention of Other Limits

A. The FEC Offers No Evidence That Circumvention Is A Genuine Problem

Buckley rejected the argument that limits on independent campaign expenditures could be justified as a means of preventing circumvention of the contribution limits, saying (at 424 U.S. at 56):

> There is no indication that the substantial criminal penalties for violating the contribution ceilings combined with the political repercussions of such violations will be insufficient to police the contribution provisions.

The FEC offers no evidence that circumvention actually occurs, much less that it is a sufficient problem to justify substantial and direct restraints on speech. The FEC Brief's seven-page circumvention argument is littered with the language of speculation, *e.g.*, a donor "*could* contribute additional amounts . . . and *could* in various ways communicate the expectation" that funds go to a candidate. FEC Brief at 25-26 (emphasis added). Despite years of discovery, there is no evidence that circumvention *does* occur, even though it could happen under present law.

In a lengthy footnote (at 31-32 n.14), the FEC Brief discusses the "tally system" by which the Democratic Senatorial Campaign Committee ("DSCC") kept track of the extent to which Senators generated financial contributions to the party. In a 1995 Conciliation Agreement in Matter Under Review ("MUR") 3620, however, the FEC approved the tally system on condition that earmarking be clearly disclaimed.

The tally system is discussed at length in the Declaration of Robert Hickmott (JA 244-53). That Declaration was obtained by the FEC following ex parte contacts and is drafted to give

maximum credence to the FEC's position. Nevertheless, Mr. Hickmott makes clear that:

- The DSCC carefully refrained from any "contract" as to how tally funds would be spent because "that would be earmarking, which is illegal" (JA 250).
- The DSCC carefully reviewed the fundraising letters of candidates to make sure they did not mislead contributors as to the operation of the tally process (JA 250).
- The DSCC allocated money raised through the tally process based upon "the financial strength of the campaign itself, including how much they had raised on their own behalf and how much there was on tally for the DSCC, and what their poll numbers looked like," as well as "who had the best chance of winning or who needed the money most" (JA 250-51).
- The "bottom line" of the tally system is that "some candidates get back more money than they raise, and others get less" (JA 250).[24]

Other of the FEC's declarants made the same points. Senator Simon explained that the tally system "made clear that this is not just automatic, so that no one could say if Tom Smith contributed $5,000 to the DSCC, that was a way of laundering it coming to Paul Simon" (FEC Brief at 32 n.14). Similarly, an aide to Senator Fowler explained that "we were not able to tell these contributors that the money could come back directly to help us," but that tallied contributions were "an indirect help to Mr. Fowler." *Id.*

[24] Also of interest is Mr. Hickmott's testimony that: "I am not aware of any instance in which a Senator who had to cast a particularly difficult vote was promised DSCC money in return for that vote" (JA 253).

In 1996, before this Court, the circumvention theory was first raised. The Colorado Party responded as follows:

> Amicus Common Cause argues (Br. 10-11) that party spending limits are necessary to prevent Senate candidates from becoming beholden to donors who, notwithstanding § 441a(a)(8), can contribute up to $120,000 ($20,000 per year) to a national party during a candidate's six-year term in addition to the $2,000 statutory maximum to the candidate. This argument is misleading on several levels. First individuals may not contribute $20,000 per year to a state political party like the Colorado Party. *See* § 441a(1)(C) (limiting annual contributions to $5,000). Second, individuals are limited to making $25,000 in total contributions to campaigns, PACS and party committees in any given year. § 441a(a)(3). Therefore, although an individual may contribute up to $20,000 per year in unearmarked funds to a national party, the individual would consequently be limited to contributing $5,000 to all other parties, PACS, and campaigns. Further, Common Cause ignores the impact of inflation on FECA's party-spending limits during the last two decades. In 1974 dollars, the Colorado Party's $5,000 contribution limit is worth only $1,618.12 today; the $20,000 limit to national parties is worth only $6,472.48. *See* FEC 22 Record 4 at 15 (Apr. 1996). Finally, *Common Cause did not cite a single example of such a contribution pattern in the 20 years of FECA.*

Colorado I Reply Brief at 5-6 n.5 (emphasis added). Another five years have passed and still neither the FEC, nor any *amici*, has identified a single example of such a contribution pattern during the 25 years of FECA.

The FEC's lack of evidence of circumvention is not surprising. FECA provides interlocking multilayered provisions designed to prevent circumvention. For example,

individuals are limited to giving $1,000 per year to a particular candidate or campaign committee. That limit is backed up with annual limits of $20,000 on contributions to a national party and $5,000 to a state party or a PAC. Those limits are further bolstered by an annual $25,000 limit on all hard money contributions by a contributor.[25] These limits are enforced by stringent reporting and disclosure requirements. On top of all of this, FECA restricts both donors that attempt and conduits that facilitate evasion of limits by "earmarking" contributions to particular candidates or campaigns. Knowing violation of any of these restrictions can lead to as much as a year in jail, not to mention the political consequences. Similar disclosure requirements and restrictions apply to PACs as well as individuals.

The FEC declarants who addressed the DSCC tally system were clear that the DSCC was careful to avoid violating FECA. Their testimony proves that FECA's restraints already are effective. Conduct to which the FEC objects, such as the tally system, occurs because it is lawful. If Congress wants to stop such conduct, it can simply forbid it, rather than relying on oblique disincentives that limit party speech.

The FEC Brief asserts (at 27-29) that Congress believed that circumvention might occur. As discussed above (at 38), the FEC proffered as evidence floor remarks made in 1973 concerning a bill that Congress never enacted. The remarks of these Senators focused on a provision allowing an individual to contribute $100,000 (equivalent to $300,000 today) directly to a party. The professed concern was that such a massive contribution might give rise to temptations that would not be resisted.

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[25] Thus, if a contributor gave $5,000 to a state committee of a party, and $20,000 to the national committee of that party, the contributor could make no additional hard money contributions to any candidate, committee, or PAC during the calendar year.

Under FECA, however, an individual at most can give $20,000 to a national party committee and $25,000 total in all hard money contributions in any calendar year. That is a very small fraction of the amounts that the individuals quoted by the FEC found to be of concern.

The FEC Brief argues (at 29) that *Buckley* (424 U.S. at 38) "upheld FECA's $25,000 annual aggregate limit on individual contributions" to restrict "the possibility of evasion," and *California Med. Ass'n v. FEC*, upheld a similar aggregate limit. 453 U.S. 182, 198 (1981). However, those aggregate limits directly targeted contribution amounts and obviously were adopted to reinforce more specific limits. Moreover, they raised little First Amendment concern since the much lower specific limits had been held to impose only a marginal burden on speech. 424 U.S. at 20. Individual aggregate limits are not analogous to the Party Spending Provision, which has no obvious relationship to contribution limits and was enacted to reduce the overall level of campaign speech. Moreover, the Party Expenditure Provision limits' direct and substantial burdens on party speech raise very different considerations.

B. The FEC's Circumvention Theory Would Stand The First Amendment On Its Head

The FEC's circumvention argument attempts an end run around the First Amendment. As is shown above (at 25-26), contribution limits on individuals and PACs were sustained because they were found to impose only marginal and limited burdens on First Amendment rights. Now, to indirectly reduce the speculative possibility contribution limits might be circumvented (notwithstanding the anti-earmarking provision and other structural protections), the FEC proposes to sustain the direct and substantial burden on party speech imposed by the Party Expenditure Provision limit. That truly would stand the First Amendment on its head. The FEC cites no authority to sustain such a circumvention theory, and we know of none.

IV. The FEC's Proposed Justifications Fall Short, Regardless Of The Applicable Standard Of Scrutiny

A. The FEC's Theories Of Justification Are Novel And Implausible And Thus Require Substantial Support, Which Is Lacking

Shrink Mo. holds that "the quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary . . . with the novelty and plausibility of the justification raised." 120 S. Ct. at 906. It held that Missouri had met its burden because (i) in light of *Buckley*, the government's claim that such limits prevented corruption was neither novel nor implausible, (ii) the state submitted evidence of a legislative finding that the contribution limits avoided a "real potential to buy votes," and (iii) the district court found as a fact that the 74% of Missouri's referendum voters who approved the limits reasonably believed that the limits would prevent corruption. 120 S. Ct. at 906-08. *Shrink Mo.* also noted the absence of substantial countervailing evidence. *Id.* at 908.

By contrast, the FEC's justifications are both novel and implausible. No ruling of this Court suggests that a party's expenditure of its hard money to support its own candidates is likely to be corrupting.[26] Certainly, no such judgment was made by Congress, which had a positive view of parties and adopted the Party Expenditure Provision primarily to reduce

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[26] To the contrary, this Court recently stated that:

> our cases vigorously affirm the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party "select[s] a standard bearer who best represents the party's ideologies and preferences."

California Democratic Party v. Jones, 120 S. Ct. 2402, 2408 (2000) (citing *Ev v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 224 (1989)).

the overall level of campaign speech. *Colorado I*, Pet. App. 104a. No public referendum or similar information demonstrates that the public is concerned over the level of coordinated party speech funded by hard money, as opposed to large soft money contributions. Nor is it plausible that hard money contributions, received pursuant to FECA's limits, are a likely source of corruption. While parties are led by people, and people are not perfect, there is no reason to believe that FECA's regime of disclosure, limits, and sanctions, backed up by a vigilant press and the scrutiny of political opponents, is inadequate to encourage compliance with the law.

Equally novel and implausible is the FEC's claim that the Party Expenditure Provision is necessary to prevent circumvention of FECA's limits on individual and PAC contributions. As just discussed, that is not why Congress adopted the Party Expenditure Provision. No holding of this Court suggests that a circumvention problem exists that must be dealt with by limiting a party's hard money funded speech. To the contrary, the FEC Brief's discussion of the DSCC tally system shows that that committee scrupulously obeys the law. Nor is the Party Expenditure Provision a natural or direct way to prevent circumvention of limits on individual and PAC contributions.

The FEC had ample opportunity to develop the evidence. This is not a case in which a lower court has acted swiftly and with limited discovery to prevent an imminent First Amendment threat. Instead, this is a case in which, after four years of initial discovery, this Court remanded for further inquiry, giving the FEC yet another year and one-half to submit evidence. The fact that a lengthy intense, and focused inquiry found no evidence of a circumvention problem is compelling evidence that no such problem exists.

Moreover, the Colorado Party presented strong evidence that coordinated party spending is not corruptive but is desirable. The Colorado Party did not merely cite to

"academic studies" as occurred in *Shrink Mo.* 120 S. Ct. at 900. Rather, the Party's experts developed comprehensive reports that then were tested in the crucible of cross-examination. The FEC's inability to overcome this strong evidence further confirms that the Party Expenditure Provision cannot be justified.

In sum, the district court and the court of appeals correctly concluded that the FEC has failed to show that the Party Expenditure Provision limits serve sufficiently important interests to meet the standard mandated by *Shrink Mo.*, much less the compelling interest demanded by strict scrutiny.

B. The Party Expenditure Provision Limits Are Not Closely Drawn To The FEC's Proffered Justification

If the FEC could establish that the Party Expenditure Provision limits serve sufficiently important interests, the *Shrink Mo.* standard then would require a demonstration that the limits are "closely drawn" to serve those interests. 120 S. Ct. at 899. The FEC Brief makes no apparent effort to meet this requirement. Nowhere does the Brief identify specific interests and then undertake to show that the Party Expenditure Provision is shaped to deal with that interest while avoiding unnecessary First Amendment burden. Nor could such a showing be made.

The FEC's theories of actual, potential, and perceived corruption overwhelmingly start with a concern over large contributions to a political party. If such concerns are substantial, a closely drawn response would be to reduce the allowable size of contributions. *Colorado I*, Pet. App. at 132a.[27] While over regulating hard money, Congress and the

[27] The *Amici* political scientist (at 3) advocate *increasing* hard money contribution limits. Moreover, the Shays-Meehan Bill passed by the last Congress would have increased individual contributions to state parties to

FEC to date have failed to limit soft money contributions. To address supposed corruption concerns by restricting a political party's use of hard money to fund coordinated speech is fairly described as irrational and perverse.

The FEC Brief argues (at 33) that, because political parties are run by people, and people are not perfect, party support must be feared. However, the people who run parties operate within a unique network of institutional and legal constraints that make manipulation of party speech a most unlikely route of corruption—as experience has shown. Moreover, the FEC's argument proves too much. By the FEC's rationale, candidates should not be allowed to have *any* important relationships with any person or institution controlled by people.

Tellingly, the FEC Brief relegates its one factual discussion—that concerning the DSCC tally system—to a footnote (at 31-32 n.14). If the tally system of one party committee (the DSCC) circumvents the ban on earmarking—a proposition the FEC has rejected—the closely drawn solution would be to make the anti-earmarking law clearer. The FEC's own declarants uniformly attested that those who operated the tally system were scrupulously careful to obey their understanding of the law as enunciated by the FEC in MUR 3620. To address the supposed circumvention problem by restricting every party's ability to use hard funds to engage in coordinated speech with its candidates is truly tangential and obscure. It is not a closely drawn response.

The truth is that the FEC Brief is hard pressed to show that the Party Expenditure Provision limit even affects the concerns that the FEC proffers as justifications. The FEC Brief does not and cannot show that the limits are closely

$10,000 per year, doubling the size of the current limit. H.R. 417. McCain-Feingold would have done the same. S. 1593.

drawn to those interests, much less that the narrow tailoring required by strict scrutiny has been achieved.

V. The Party Expenditure Provision Limits Are Void For Overbreadth

Where a provision substantially burdens speech in ways that the government has not justified, and there is "no core of easily identifiable and constitutionally proscribable conduct" to which a limiting construction can confine the provision, then the entire provision is invalid for overbreadth. *Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 966 (1984); *see Broadrick v. Oklahoma*, 413 U.S. 601 (1973) (First Amendment overbreadth must be substantial). Indeed, if a provision imposes impermissible First Amendment burdens only "at its margins," but cannot be narrowed to "easily identifiable and constitutionally proscribable" conduct, it must be invalidated. *Osborne v. Ohio*, 495 U.S. 103, 112 (1990); *see New York v. Ferber*, 458 U.S. 747, 773 (1982) (stating rule but declining facial invalidity where the "arguably impermissible applications" amount to "no more than a tiny fraction" of the provision's legitimate scope).

The FEC Brief observes (at 20) that FECA's restrictions on coordinated party expenditures restrict a range of conduct. At one extreme, largely independent party speech is limited if the candidate has requested the speech or if the party has consulted or coordinated with the candidate. § 441a(a)(7)(B)(i). At the other extreme, speech that originates with the candidate but that the party agrees to support financially is coordinated and, therefore, limited. § 441a(a)(7)(B)(ii). In between is a vast middle ground where the candidate and party work together to develop, produce, and distribute position statements and ads reflecting the positions of both party and candidate. (JA 198, 207-16).

The FEC Brief does not contend that the Colorado Party's arguments, if accepted, invalidate only marginal or

insubstantial aspects of FECA's restrictions on coordinated speech. Nor do the coordination provisions have an easily identifiable core that would be proscribable even if the Party's position prevails. Thus, FECA's categorical restrictions on coordinated spending in connection with congressional elections fail in their entirety.

The proper course here is to invalidate subsection (3) of the Party Expenditure Provision, § 441a(d)(3).[28] That would leave in place subsection (1), § 441a(d)(1), which "exempt[s] political parties from the general contribution and expenditure limitations of the statute." *Colorado I*, Pet. App. 96a.[29] It also would leave in place subsection (2), § 441a(d)(2), which imposes limits on coordinated spending in presidential races.[30] The only effect of invalidating subsection (3) would be to eliminate restrictions on coordinated party spending in congressional elections.[31]

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[28] The district court's judgment referred to all of § 441a(d) as invalid. Pet. App. 91a. However, the text of the opinion is clear that the limits in subsection (3) are the target of the ruling. The court of appeals understood the judgment to invalidate subsection (3). Pet. App. 1a-2a.

[29] The relevant language of subsection (1) is as follows:

> Notwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions [political parties] may make expenditures in connection with the general election campaign of candidates for federal office . . .

[30] Because the element of public financing of presidential elections may affect the analysis, the Colorado Party in this action has not challenged the limits on coordinated spending in presidential campaigns established by § 441a(d)(2).

[31] The FEC's Brief in *Colorado I* argued (at 17) that, if subsection (3) is invalidated, the exception from other restrictions granted by subsection (1) also would evaporate, leaving parties subject to the same $5,000 limit on coordinated spending and contributions that applies to PACs. Such a result would be bizarre, however, since the rationale for striking subsection (3) would be that even higher limits are an unconstitutional burden on party speech and association. Given FECA's strong

CONCLUSION

For the above-stated reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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ADDENDUM

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severability provision, § 454, there is no reason that striking subpart (3) should impair subpart (1).

The FEC Brief suggests (at 5-6 n.3) that § 441a(a)(2) imposes a $5,000 limit on money contributions by a party to its candidate, notwithstanding § 441a(d)(1). The Colorado Party has not challenged that position in this action and takes no position concerning it, provided the limit is not construed to reach coordinated party expenditures.

The Colorado Party's Amended Complaint expressly asserts that all limits imposed by FECA on coordinated speech are invalid "(i) facially, (ii) as applied to political parties such as the State Party, and (iii) as interpreted by the FEC." (JA 23). If the Court declines to hold subsection (3) facially invalid, it should declare that FECA cannot constitutionally be applied to restrict coordinated party speech in connection with congressional elections.

Party Activity on Behalf of Senators Filing Amicus Brief

Senator	Party	State	Election	Winning Percentage	Party Contributions	Party Coordinated Expenditures	Receipts of Campaign*	Percentage of Receipts	Source
[redacted]									
Russell D. Feingold	D	Wis.	1998	50%	$ 850	$ 118,608	$ 4,072,878	2.9%	(B)
Russell D. Feingold	D	Wis.	1992	52%	$ 27,587	$ 353,210	$ 1,996,312	19.1%	(C)
[redacted]									
John McCain	R	Ariz.	1998	68%	$ 1,000		$ 4,450,544	0.0%	(B)
John McCain	R	Ariz.	1992	55%	$ 18,500	$ 302,528	$ 3,344,311	9.6%	(C)
[redacted]									
Charles E. Schumer	D	N.Y.	1998	54%	$ 500	$ 2,575,200 †	$ 16,825,671	15.3%	(B)

ADDENDUM A

Sources:

(A) Press Release, Federal Election Commission, FEC Reports Major Increase in Party Activity for 1995-96 (rel. Mar. 19, 1997) at pp. 12-13.
(B) Press Release, Federal Election Commission, FEC Reports on Political Party Activity for 1997-98 (rel. April 9, 1999) at pp. 13-15.
(C) Press Release, Federal Election Commission, Democrats Increase Spending by 89% in the '92 Cycle (rel. Jan. 1994) at pp. 7, 9.

*** Election Cycle only.**
† The Total Party Coordinated Expenditures for Senator Schumer include $560,000.05 from the Liberal Party of New York State and $439,700 from the Independence Party Federal Committee. See FEC Disclosure Report Search Results at http://www.fec.gov.